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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBBINS TIRE AND RUBBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board and its General Counsel,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–26A) is not yet officially reported. The memorandum opinion of the district court (App. C, *infra*, pp. 28A–34A) is not reported.

[1] Under Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), the General Counsel has "final authority on behalf of the Board, in respect of the investigation of charges and the issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *." References hereafter to "the Board" refer as well to the General Counsel acting in his independent capacity.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 27A) was entered on November 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pre-hearing disclosure of statements of prospective witnesses, obtained by the National Labor Relations Board in an investigation that has culminated in a pending unfair labor practice proceeding would "interfere with enforcement proceedings," so that the statements are exempt from disclosure under Exemption 7(A) of the Freedom of Information Act ("FOIA").

2. Whether such statements are exempt from disclosure under Exemption 5 of the FOIA as the work product of an attorney prepared in contemplation of litigation.

STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552, are as follows:

> Public information; agency rules, opinions, orders, records, and proceedings
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

> * * * * *
>
> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B)

deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

A. THE BOARD PROCEEDINGS

Upon a petition filed by the Aluminum Workers International Union, AFL–CIO ("the Union"), the Regional Director of the National Labor Relations Board conducted a representation election among a unit of employees of Robbins Tire and Rubber Company ("the Company") on October 9, 1975; 244 votes were cast for the Union, 248 against it, and 10 ballots were challenged (A. 11).[2] The Union filed timely

[2] "A." refers to the Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

objections to the election, which were investigated by the Regional Director. The Regional Director recommended to the Board that 7 of the challenged ballots be counted, and, if they did not result in the Union's receiving a majority of the votes cast, that a hearing be held on certain of the Union's objections (A. 11–24). The Board adopted the Regional Director's recommendations (A. 25–26).

Meanwhile, on March 26, 1976 the Regional Director issued an unfair labor practice complaint against the Company alleging that it had committed numerous violations of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(1), during the pre-election period, including (1) interrogating employees about their union activities; (2) promising benefits if the employees rejected the Union; (3) threatening that if the Union were selected it would discharge pro-union employees, close the plant, withdraw benefits, and refuse to bargain (A. 29–36). A hearing on the complaint was scheduled for April 27, 1976 (A. 35).

When a count of the challenged ballots failed to resolve the election in the Union's favor, it was necessary to hold a hearing on the Union's election objections. Since the conduct covered by those objections was largely identical to that covered by the unfair labor practice complaint, the Regional Director consolidated the two proceedings and set the objections down for hearing at the same time as the hearing on the complaint (A. 5).

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On March 31, 1976, the Company, invoking the Freedom of Information Act (FOIA), 5 U.S.C. 552, wrote the Regional Director requesting that he make available for inspection and copying, at least seven days prior to the start of the hearings, copies of all written statements, signed or unsigned, contained in the Board's case files with respect to witnesses that the Board intended to call (A. 38–39). The Regional Director denied this request on the ground that the information was privileged against disclosure under Exemptions 5 and 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5), (7)(A), (C) and (D) (A. 40–43). The Company appealed the Regional Director's denial to the General Counsel of the Board (A. 44–46). The General Counsel sustained the Regional Director.[3]

B. THE FOIA SUIT

On April 15, 1976, before it had received the General Counsel's decision on its appeal, the Company filed this action in the United States District Court for the Northern District of Alabama, pursuant to the FOIA, 5 U.S.C. 552(a)(4)(B), alleging that the statements sought were records that the Board was required to disclose under 5 U.S.C. 552(a)(3). The Company sought, *inter alia,* a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, an order requiring the Board to produce the requested statements for inspection and copying at least seven days

[3] A copy of the General Counsel's letter is set forth in App. E, *infra*, pp. 37A–39A.

prior to the start of the hearing, and a permanent injunction enjoining the Board from holding its hearing until this condition had been met (A. 7–8).

After a consolidated hearing on the merits of the complaint and the application for a preliminary injunction, the district court rejected the Board's claim that the statements sought were protected against disclosure under Exemptions 5 and 7, and it ordered the Board to provide the statements for inspection and copying on or before April 22, 1976, or, at the Board's election, at least five days prior to any hearing where the person making the statement or affidavit would be called as a witness (App. C *infra,* pp. 28A–34A; App. D, *infra* pp. 35A–36A).

The court of appeals affirmed (App. A, *infra*). It concluded that Exemption 7 of the FOIA, which protects against disclosure of investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, is inapplicable unless an agency makes a showing that disclosure would interfere with a particular enforcement proceeding (*id.* at 11A–12A). Since the Board had not introduced any evidence tending to show that intimidation of those witnesses giving statements to the Board was likely to occur in this case during the five days between discovery and the Board hearing, the court held that the Board had not "sustained its burden of * * * bring[ing] Exemption (7a) into play" (*id.* at 17A).

The court of appeals also concluded that Exemption 5, which protects against disclosure of " 'inter-agency

or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency,' " was inapplicable to "purely factual material such as verbatim witness statements" (*id.* at 21A, 22A). The court acknowledged (*id.* at 21A) that Exemption 5 incorporates the work-product privilege of *Hickman* v. *Taylor,* 329 U.S. 495, which generally protects even relevant and non-privileged witness statements unless production is essential to the preparation of one's case. The court reasoned, however, that the *Hickman* privilege as read into Exemption 5 "must be applied consistently with Congress' intent to protect only against disclosure of governmental policy-making processes" (*ibid.*).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding in this case that witness statements obtained by the Board during an investigation culminating in a pending unfair labor practice proceeding are not protected from pre-trial disclosure by FOIA Exemption 7(A), absent proof that intimidation of particular witnesses is likely to occur in the circumstances of the particular case, is erroneous and in direct conflict with the decision of the Second Circuit in *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F. 2d 484, certiorari denied, 429 U.S. 834, and the decisions of six other circuits that have followed *Title Guarantee.*[4]

[4] See, e.g., *Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d 145 (C.A. 1), certiorari denied, 429 U.S. 895; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, 538 F. 2d 80 (C.A. 3);

The Fifth Circuit's construction of the FOIA sanctions its use as a discovery device in unfair labor practice proceedings, despite the fact that the FOIA does not purport to affect such discovery or to override the strict limitations that the Board and the courts have traditionally placed on such discovery because of the potential for intimidation and harassment inherent in the relationship between employer and employee. The question presented here is of major importance to the proper administration of the National Labor Relations Act, and the FOIA as well. Until it is resolved by this Court, the unfair labor practice proceedings throughout the wide geographic area included in the Fifth Circuit will be seriously impeded. The Board and its General Counsel anticipate that they will receive requests for the pre-trial disclosure of witness statements in virtually all of the many unfair labor practice proceedings that arise in the Fifth Circuit. So long as the Fifth Circuit's decision remains outstanding, the Board has no practicable alternative but to postpone many of those proceedings in order to avoid irreparable injury from prehearing release. Accordingly, prompt resolution of the issue by this Court is warranted.

National Labor Relations Board v. *Hardeman Garment Corp.*, 577 F. 2d 559 (C.A. 6); *Abrahamson Chrysler-Plymouth, Inc.* v. *National Labor Relations Board*, 561 F. 2d 63 (C.A. 7); *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board*, 550 F. 2d 1139 (C.A. 9); *Climax Molybdenum Co.* v. *National Labor Relations Board*, 539 F. 2d 63 (C.A. 10). See also *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1135–1136 (C.A. 4).

1. a. Exemption 7, as originally enacted,[5] was uniformly held to cover the statements of prospective witnesses obtained during the Board's investigation of unfair labor practice charges or objections to a Board-conducted election. The courts construed Exemption 7 as intended (1) to prevent premature disclosure of the government's investigation, so that it could present its strongest case in court,[6] and (2) to protect government sources, so that persons would volunteer statements without fear of reprisal or invasion of privacy.[7] They therefore concluded that the statute did not permit disclosure of statements compiled in connection with pending Board proceedings. See *Wellman Industries, Inc.* v. *National Labor Relations Board,* 490 F. 2d 427, 431 (C.A. 4), certiorari denied, 419 U.S. 834, and cases there cited. See also *Clement Brothers Co.* v. *National Labor Relations Board,* 282 F. Supp. 540, 542 (N.D. Ga.), approved, *National Labor Relations Board* v. *Clement Brothers Co.,* 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton,*

[5] As originally enacted Exemption 7 of the FOIA protected against disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

[6] See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong, 2d Sess. 11 (1966).

[7] In enacting the original Exemption 7, Congress was particularly concerned with the problem of pre-trial disclosure of Board witness statements, for as Senator Humphrey explained (110 Cong. Rec. 17667 (1964)):

> Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing.

271 F. Supp. 591, 593–594 (D. P.R.), cited with approval, *Bristol Myers Co.* v. *Federal Trade Commission,* 424 F. 2d 935, 939 (C.A. D.C.), certiorari denied, 400 U.S. 824.

This interpretation of Exemption 7 was also based upon the conclusion that Congress had committed the matter of discovery to the Board's rule-making power.[8] The Board's rules provide that a pre-trial statement becomes available to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing * * *," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1) (1975); this rule rests on the Board's judgment that, because of the fear of reprisal from the employer or the union, employees and others would be reluctant to furnish information to the Board without the assurance that it will not be disclosed unless and until they testify at a formal hearing.[9]

b. In 1974 Exemption 7 was amended, in pertinent part, to cover:

> investigatory records compiled for law enforcement purposes, but only to the extent that the

[8] See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631 (C.A. 9); *D'Youville Manor* v. *National Labor Relations Board*, 526 F. 2d 3 (C.A. 1).

[9] See, *National Labor Relations Board* v. *Lisdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2); *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).

> production of such records would (A) interfere with enforcement proceedings * * *.

There is no indication that Congress intended this amendment to overrule the numerous cases holding that witness statements obtained by the Board in an investigation of an on-going case were exempt from disclosure under the original Exemption 7, or to enlarge the scope of discovery under the NLRA.[10] Indeed,

More than 94 percent of all unfair labor practice cases closed during fiscal year 1976 were closed prior to hearing (*National Labor Relations Board Forty-First Annual Report* 222 (1976)), and many affiants who gave statements in the remaining 6 percent of the cases were never called to testify because their testimony would have been cumulative or irrelevant to the issues ultimately framed in the complaint.

[10] The amendment was aimed, instead, at a series of decisions by the Court of Appeals for the District of Columbia Circuit in 1973–1974, which had interpreted Exemption 7 as covering any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether future enforcement proceedings were possible in that case, or even whether the information was otherwise available to the public. See *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F. 2d 370 (C.A. D.C.); *Ditlow* v. *Brinegar*, 494 F. 2d 1073 (C.A. D.C.); *Aspin* v. *Department of Defense*, 491 F. 2d 24 (C.A. D.C.); *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (C.A. D.C.), certiorari denied, 416 U.S. 993.

The colloquy between Senators Hart and Kennedy highlighted this point (120 Cong. Rec. 17039–17040 (1974)):

"Mr. Kennedy. * * * Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

"* * * As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Senator Hart, a sponsor of the amendment, explained (120 Cong. Rec. 17033 (1974)) that the original purpose of Congress in enacting Exemption 7 was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have," and that the amendment would continue to bar disclosure:

> First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not

"Mr. Hart. The Senator from Massachusetts is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do."

Senator Hart also stated, at another point (*id.* at 17033):

"Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption."

He added (*id.* at 17034):

"This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information."

> in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding * * *."

c. Accordingly, the courts of appeals considering this question have uniformly—with the exception of the Fifth Circuit—adopted the reasoning of the Second Circuit in *Title Guarantee, supra,* 534 F. 2d at 491, that prehearing disclosure of statements obtained from employees and their representatives would "interfere" with pending enforcement proceedings in two ways: "first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *." It has therefore been held in circuit after circuit that "[d]iscovery with respect to government witnesses is restricted in recognition of

[11] Although Senator Hart added (*ibid.*) that, "it is only relevant to make such determination in the context of a particular enforcement proceeding," he did not discuss the type of showing that would be required in the particular case, nor foreclose the possibility that, as with witness affidavits in Board enforcement proceedings, interference with the law enforcement proceeding could be inferred from the nature of the documents sought.

the peculiar character of labor litigation: the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son,* v. *National Labor Relations Board,* 538 F. 2d 80, 83 (C.A. 3). In Board proceedings, the statutory criterion of harm to the particular enforcement proceeding is inferred, because "[t]he labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings." *Climax Molybdenum Co.* v. *National Labor Relations Board,* 539 F. 2d 63, 65 (C.A. 10). As the Ninth Circuit concluded, "[t]here can be no doubt" that pre-trial disclosure of employee statements would have a "retarding effect on open and frank Board investigations of alleged unfair labor practices" which "would undermine labor policy as well as unduly broaden the scope of the FOIA." *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board,* 550 F. 2d 1139, 1140.

Title Guarantee involved a request for the statements of all witnesses, but as the First Circuit held in *Goodfriend Western Corp.* v. *Fuchs,* 535 F. 2d 145, certiorari denied, 429 U.S. 895, the rationale of the *Title Guarantee* line of cases is equally applicable where the request is limited to the statements of witnesses the Board intends to call at a scheduled hearing, as in the instant case. As the *Goodfriend* court rea-

soned, whether the request is for the statements of all witnesses, or only those scheduled to testify, there is a "possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * *.' More important, whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress left to the Board." 535 F. 2d at 147. See also *New England Medical Center Hospital* v. *National Labor Relations Board,* 548 F. 2d 377, 382–383 (C.A. 1).

d. The Fifth Circuit's conclusion that the Board must introduce evidence in each case to show the likelihood of intimidation ignores the reality of labor relations. Despite the risk that prospective witnesses may be harassed and intimidated—which the court below recognized [12]—the Board would be unable to sustain the burden of proof in many cases, since intimidation (and its likely prospect) "may be subtle and not susceptible of proof." *National Labor Relations Board* v. *Hardeman Garment Corp.,* 557 F. 2d 559, 562, n.8 (C.A. 6). In other cases, meeting this burden might require the Board to reveal so much of the evidence ascertained in its unfair labor practice

[12] App. A, *infra*, p. 14A.

[13] The court indicated that the following factors, *inter alia*, would be relevant to such a showing: "whether the history of labor relations in the community and at the plant makes intimidation of the witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give" (App. A, *infra*, p. 16A).

investigation [13] that, even if the district court were ultimately to rule that the statements could be withheld, the victory would be a Pyrrhic one.

Moreover, determining on a case by case basis whether disclosure of a particular statement would interfere with NLRB enforcement proceedings is a task for which, as the Tenth Circuit correctly noted, the courts are "ill-fitted." *Climax Molybdenum Co., supra,* 539 F. 2d at 65. Indeed, as the First Circuit explicitly recognized, "It is difficult to conceive of a greater interference than one which would involve the courts in arbitrating the Board's control of what documents to retain and what to surrender immediately prior to an enforcement proceeding." *New England Medical Center* v. *National Labor Relations Board,* 548 F. 2d 377, 383 (C.A. 1); see also *id.* at 384.

The result of the Fifth Circuit's ruling is to transform the FOIA into a new and potent discovery tool in Board enforcement proceedings,[14] despite this

[14] The court of appeals found (App. A, *infra*, p. 8A) it "questionable that FOIA disclosure would result in an increase in discovery rights in this court," because of its holding in prior cases that Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), requires the Board to adopt discovery procedures comparable to those included in the Federal Rules of Civil Procedure. However, as the court here also recognized (*id.* at 8A and n. 11), other courts that have considered the question have concluded that the NLRA does not require the Board to adopt discovery procedures. See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631 (C.A. 9); *D'Youville Manor* v. *National Labor Relations Board*, 526 F. 2d 3 (C.A. 1).

Court's recognition that the FOIA was designed to inform the public about agency action, and not to authorize discovery or otherwise benefit private litigants. See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10. As the Second Circuit correctly concluded in *Title Guarantee, supra*, 534 F. 2d at 491–492:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160 (b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery.

2. The Fifth Circuit also erred in concluding that the witness statements were not protected by FOIA

Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

This Court has held that Exemption 5 protects documents which are "normally privileged in the civil discovery context," and that it incorporates not only the government's executive privilege, but also "the attorney work product privileg[e]." *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149. Indeed, the Senate Report on the FOIA stated that this exemption would include "the working papers of the agency attorney." S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).

As the Fifth Circuit acknowledged (App. A, *infra*, p. 21A), the witness statements requested by the Company in this case fall within the work product privilege, as defined in *Hickman* v. *Taylor*, 329 U.S. 495, because they are documents prepared in anticipation of litigation, either by attorneys or those working with attorneys. The witness statements sought here are exactly the same type of documents that were sought in *Hickman*. Accordingly, if the full privilege recognized in *Hickman* is incorporated into Exemption 5, the statements fall within the protection of that Exemption.

However, the court of appeals, concluding that "the purpose of exemption 5 was to protect agency deliberative processes" (App. A, *infra*, p. 22A), held that

"purely factual material such as verbatim witness statements must not fall within [Exemption 5]" (*ibid.*).[15] The court based its conclusion upon this Court's holding in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, that the executive privilege incorporated into Exemption 5 does not protect purely factual material from disclosure. The premise of the Court's analysis in *Mink* was its discussion of the "finite limits" of the doctrine of executive privilege, and its conclusion that—in the absence of a claim of state secrets—purely factual material would be available for discovery by private parties in litigation with the government. 410 U.S. at 87–88. Since the purpose of executive privilege is to encourage frank discussion of legal and policy matters among agency personnel by shielding such deliberations from public scrutiny, materials reflecting deliberative or policymaking processes stand on a different footing than purely factual material because disclosure of the latter would not ordinarily reveal the deliberative process.

This reasoning is not, however, applicable to the attorney work product privilege, which is not limited to materials reflecting an attorney's deliberative processes, but protects an attorney's entire course of preparation, including "interviews, [witnesses'] statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." *Hickman* v. *Taylor*, *supra*, 329 U.S. at 510–512; *see In re Murphy*, 560 F. 2d 326, 333–335 (C.A. 8). Since disclosure of factual material in an attorney's files would violate the protected status of these files no less than would the disclosure of deliberative material therein, the work product privilege, unlike executive privilege, protects both types of material.[16]

Accordingly, since the attorney work product privilege is not inherently limited to materials reflecting deliberative processes, but includes witness statements obtained by an attorney in advance of litigation, the court of appeals erred in holding that these statements were not within Exemption 5.

[15] A similar interpretation of Exemption 5 has been adopted by two other courts of appeals. *Deering Milliken* v. *Irving*, 548 F. 2d 1131, 1137–1138 (C.A. 4); *Poss* v. *National Labor Relations Board*, 96 L.R.R. M. 2984 (C.A. 10); but cf. *Brockway* v. *Department of Air Force*, 518 F. 2d 1184 (C.A. 8).

[16] Although this Court held in *Hickman* v. *Taylor*, *supra*, that, under Rule 26(b) of the Federal Rules of Civil Procedure, an attorney's mental impressions are entitled to an absolute privilege against disclosure whereas factual material gathered by him is entitled only to a qualified privilege, this distinction is irrelevant for purposes construing the scope of Exemption 5 of the FOIA. As this Court stated in *Sears*, *supra*, 421 U.S. at 149 n. 16, the test for determining whether documents come within Exemption 5 is whether they would "normally be protected in the civil discovery context," not whether the privilege is susceptible to being overcome by the special needs of a particular plaintiff, because "it is not sensible to construe the [FOIA] to require disclosure in the hypothetical situation in which the private party's claim is most compelling."

CONCLUSION

The petition for a writ of certiorari should be granted.

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DECEMBER 1977.

APPENDIX A

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT

No. 76–2099

United States Court of Appeals for the Fifth Circuit

Nov. 21, 1977

Appeal from the United States District Court for the Northern District of Alabama before BROWN, *Chief Judge,* GODBOLD, *Circuit Judge,* and MEHRTENS, *District Judge.**

GODBOLD, *Circuit Judge:*

This is a Freedom of Information Act (FIOA) [1] case, although it takes on the troubling coloration of a dispute about the discovery rights of respondents in National Labor Relations Board proceedings. The direct court [2] ordered the NLRB to turn over to Robbins Tire copies of all written statements of those

*Senior District Judge of the Southern District of Florida, sitting by designation.

[1] 5 U.S.C. § 552, *as amended by* Act of Nov. 21, 1974, Pub.L. No. 93–502, 88 Stat. 1561.

[2] 92 L.R.R.M. 2586 (N.D. Ala., 1976).

who will be called to testify [3] in a consolidated representation and unfair labor practice proceeding involving that company. The order required that these documents be transmitted "on or before April 22, 1976, or, at the election of the Board, on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness." [4] A panel of this court has denied the Board's motion for a stay pending appeal, and the NLRB hearing has been held in abeyance for over a year pending the outcome of this appeal. We affirm.

[1] First, there is a jurisdictional problem. The Board argues that the effect of the order to disclose statements of witnesses was to enjoin its proceeding against the company. It casts its argument as an exhaustion requirement, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938), and asserting that Robbins Tire would suffer no irreparable injury if forced to challenge the Board's action afterwards on appeal, 29 U.S.C. §§ 160(e)–(f). *See also Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974); 51 St. John's L. Rev. 251, 254 n. 17 (1977). We need not decide whether or when a district court adjudicating a FOIA claim may en-

[3] We do not know how many of those whose statements are sought here are employees of Robbins Tire, since the Board has never disclosed the materials even to the district court in camera. The court found it unnecessary to resort to in camera inspection of the statements because neither party disputed that they were prepared for use in the Board proceeding.

[4] The company had sought a longer preparation period of seven days.

join ongoing or prospective NLRB proceedings in an effort to compel the disclosure required by the Act. In this case, the district court did not enjoin the hearing. The Board argues that this was the effect of its order. But whether or not an order constitutes an injunction is a question that does not turn on the subjective importance attached to it by the defendant and his resulting action in the circumstances. Like similar orders in the more conventional discovery context, this one gave the NLRB a choice. It could produce the statements, it could proceed without resort to the testimony of these particular affiants or it could forego the hearing. While the unpalatability of this choice might well form part of the rationale for finding a substantive exemption under FOIA,[5] it cannot be transformed into a jurisdictional question by the Board's decision to hold its hearing in abeyance.

EXEMPTION 7(A)

The Board asserts that the statements of prospective witnesses fall within exemption 7(A), which protects against disclosure of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, * * *." 5 U.S.C. § 552 (b)(7)(A). The issue here is whether pre-hearing disclosure of the contents of statements made by those prepared to testify in support of the Board's case would actually "interfere" with the Board's case. In *Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d 145

[5] *See New England Medical Center Hosp.* v. *NLRB*, 548 F. 2d 377, 384 (Cal, 1976) (denying FOIA disclosure on the merits, under exemption 7(A), for the same reasons). *But see* note 29, *infra*.

(CA1) (per curiam), *cert. denied,* 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976), the First Circuit has held that it would.

[2] We think our answer can be found by ascertaining what Congress meant by "interfere," bearing in mind the dictum that FOIA was a comprehensive effort to publicize all agency action and that its exemptions are to be narrowly construed. *Department of the Air Force* v. *Rose,* 425 U.S. 352, 360–61, 96 S. Ct. 1592, 48 L. Ed. 2d 11, 21 (1976). As Judge Oakes explained in the leading case of *Title Guarantee Co.* v. *NLRB,* 534 F. 2d 484 (CA2), *cert. denied,* 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976),[6] this language was the result of a change

[6] Judge Oakes' rationale in *Title Guarantee,* which unlike our case did not involve a request limited to statements of prospective witnesses, has been persuasive enough to have formed the basis of every subsequent appellate decision under FOIA involving statements obtained by the NLRB in the course of unfair labor practice investigations. All of these cases have held exemption 7(A) applicable. *Goodfriend Western Corp.* v. *Fuchs,* 535 F. 2d 145 (CA1), *cert. denied,* 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976); *New England Medical Center Hosp.* v. *NLRB,* 548 F. 2d 377 (CA1, 1976); *Roger J. Au & Son, Inc.* v. *NLRB,* 538 F. 2d 80 (CA3, 1976); *NLRB* v. *Hardeman Garment Corp.,* 557 F. 2d 559 (CA6, 1977); *Abrahamson Chrysler-Plymouth, Inc.* v. NLRB, 559 F. 2d 1226 (CA7, 1977); *Harvey's Wagon Wheel, Inc.* v. *NLRB,* 550 F. 2d 1139 (CA9, 1976); *Waldo Hosp. Ass'n, Inc.* v. *NLRB,* No. 76–3315 (CA9, Mar. 10, 1977) [unpublished Order]; *Climax Molybdenum Co.* v. *NLRB,* 539 F. 2d 63 (CA10, 1976); *Cessna Aircraft Co.* v. *NLRB,* 542 F. 2d 834 (CA10, 1976); *Maremont Corp.* v. *NLRB,* 79 CCH Labor Cases ¶ 11,790 (CA10, Oct. 5, 1976). *But see* 45 Geo.Wash.L.Rev. 114 (1976); 51 St. John's L. Rev. 251 (1977).

Several of these cases have expanded *Title Guarantee's* protections. As noted above, *Goodfriend* extended it to refuse a request limited to statements of those who would testify at a trial

offered by Senator Hart to the 1974 amendments to the FOIA after the bill had been reported out of committee. The purpose of Senator Hart's proposal was to restore the original intent of FOIA to require the agency to make a particularized showing that an investigatory file's disclosure would harm its case in court. "[I]t is only relevant to make [the exemption 7(A)] determination," Senator Hart emphasized, "in the context of the particular enforcement proceeding."[7] By making this change, Congress sought to eliminate unfounded judicial notions that a document's mere status as investigatory and enforcement-related would be sufficient to justify nondisclosure. Thus, the legislative history of exemption 7(A) reveals a sort of procedural emphasis.[8] Such an emphasis is strongly sup-

scheduled 24 hours later. *New England* applied it to exempt (1) statements of non-employees and (2) statements obtained in closed cases bearing a close temporal and factual relationship to pending cases. *But cf. Harvey's Wagon Wheel* (remanding for an initial determination of the applicability of exemption 7(A) to non-employee statements). Finally, *Climax Molybdenum* treated *Title Guarantee* as a per se rule, eliminating any need for an in camera inspection of the statements as permitted by 5 U.S.C. § 552(a)(4)(B).

On the other hand, *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131 (CA4, 1977), while in dictum accepting the rationale of *Title Guarantee,* has refused to extend exemption 7(A) to protect affidavits in the context of a proceeding to determine only backpay claims after liability has been established.

[7] Staffs of House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93–502) Source Book: Legislative History, Texts, and Other Documents 333 (Joint Comm. Print 1975) [hereinafter cited as Source Book].

[8] Senator Hart's adoption of a prior ABA Committee proposal suggests that he was particularly concerned with refusals to disclose investigatory files from closed cases. *See* Source Book 334,

plemented by the tenor of the 1974 amendments even before Senator Hart's change. As Senator Kennedy, the principal author and floor leader of the amendments, remarked, "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions." Source Book 293.

336–39, 351. But we view this as simply a particular manifestation of the need to change the exemption to require an inquiry in each situation as to whether disclosure would actually "interfere." Perhaps closed files might be so closely related to collateral proceedings pending before the agency that disclosure of them would still interfere. *See New England Medical Center Hosp.* v. *NLRB*, 548 F. 2d 377 (CA1, 1976). Conversely, the particular concern with closed files in the legislative history does not indicate to us a determination that disclosure of files in open cases, simply because they are open, would necessarily qualify as interference under exemption 7(A). *Cf.* 45 Geo. Wash. L. Rev. 114, 124 (1976) (footnotes omitted):

"The *Title* court suggested that exemption 7(A) was enacted in 1974 to resolve the problem of the unavailability of closed investigatory files. The withholding of investigatory files pertaining to closed cases was a particularly egregious abuse of exemption 7 which exemption 7(A) certainly was designed to eliminate. The 1974 amendments, however, were not drafted in terms that require disclosure of closed files and nondisclosure of open files. Congress could have easily formulated such a distinction. The amendments were phrased instead to require agencies to establish under exemption 7(A) that interference with agency enforcement proceedings would result from disclosure. Thus, while the phraseology of exemption 7(A) assumes that nondisclosure can be justified only in the context of a pending enforcement proceeding, it requires the courts to consider whether disclosure would be harmful to that proceeding before granting a 7(A) exemption. This clearly implies that not all documents pertaining to pending proceedings are automatically exempted."

Whether or not all investigatory statements may be per se exempt for other reasons is a question we address below. The point we are making here is that it violates the intent of the Hart amendment to abdicate our responsibility to consider the specific harm to agency processes that disclosure might produce.

We move next to the more substantive inquiry of what kind of interference Congress was concerned about avoiding in each particular case. Our only real clue lies in the remarks of Senator Hart:

> [Exemption 7(A)] would apply whenever the Government's case in court * * * would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding.

Source Book 333.[9]

The first sentence here suggests that the concern was with interference in the rather broad sense of premature revelation. Support for this idea can be found in Senator Hart's earlier statement that he wanted to return to the purpose revealed in the legislative history of the 1966 Act. This purpose was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have." Source Book 332, *quoting* from H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News pp. 2418, 1428. If this is what interference means, then we would be obliged to give an FOIA plaintiff-as-public-citizen no more information than he would obtain as a private litigant engaging in discovery before the agency.

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[9] The central challenge to Senator Hart's proposal dealt with exemption 7(D) and the problems of safeguarding the confidentiality of informers so as to maintain effective law enforcement information gathering, with particular reference to the efforts of the FBI. *See* Source Book 340–43, 350–51. As a result, little further explication of "interference" exists.

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In *Title Guarantee,* for example, Judge Oakes began his analysis by observing that disclosure "would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings," given Second Circuit limitations on the duty of the Board to grant pretrial discovery. 534 F. 2d at 487. However, we think that comparative discovery is not the key to the meaning of exemption 7(A).

[3] First, it is questionable whether FOIA disclosure would result in an increase in discovery rights in this court.[10] Although the Second Circuit has held that the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures,[11] this court, emphasizing the authority of 29 U.S.C. § 160(b),[12] has held that "when good cause is shown to the Board it should permit discovery in order that the rights of all parties may be properly protected." *NLRB* v. *Rex Disposables,* 494 F. 2d 588, 592 (CA5, 1974), *citing NLRB* v. *Safway Steel Scaffolds Co.,* 383 F. 2d 273 (CA5, 1967), *cert. denied,* 390 U.S. 955, 88 S. Ct. 1052, 19 L. Ed. 2d 1150 (1968); *NLRB* v. *Miami Coca-Cola Bottling Co.,* 403 F. 2d 994 (CA5, 1968); *cf. NLRB* v. *W. R. Bean & Son, Inc.,* 450 F. 2d 93, 96 (CA5, 1971, *cert. denied,* 409 U.S. 849, 93 S. Ct. 57, 34 L. Ed. 2d 91 (1972) (*Safeway Steel* and *Miami Coca-Cola* place question within discretion of administrative law judge).[13] We have also held more specifically that statements of Board witnesses are discoverable in civil contempt proceedings that the Board brings to challenge noncompliance with appellate court decrees. *NLRB* v. *Schill Steel Products, Inc.,* 408 F. 2d 803 (CA5, 1969).[14] We conclude from these authorities that, with respect to the statements of prospective witnesses, some right to discovery exists under the National Labor Relations Act.[15] Thus, we cannot agree with the Board's assertion that disclosure of witnesses' statements would inevitably interfere with enforcement proceedings even in the sense that it would always allow litigants greater discovery than they otherwise would obtain.

[10] *Title Guarantee* recognized this problem. 534 F. 2d at 487 n. 6.

[11] *NLRB* v. *Interboro Contractors, Inc.,* 432 F. 2d 854, 859–60 (CA2, 1970), *cert. denied,* 402 U.S. 915, 91 S. Ct. 1375, 28 L. Ed. 2d 661 (1971).

[12] "[NLRB unfair labor practice proceedings] shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. * * *"

[13] The recent FOIA case of *Sealand Terminal Corp.* v. *NLRB,* 414 F.Supp. 1035 (S.D. Miss., 1976), found the *Rex Disposables* line of authorities unpersuasive arguments for FOIA disclosure because these cases had held that the Board's failure to grant discovery had been harmless error. We do not agree with this logic. We are asking whether FOIA disclosure would give a litigant earlier or greater access to investigatory files than he would otherwise have. For this purpose, it seems irrelevant whether a Board examiner's error in failing to allow pretrial discovery was harmless. Our only inquiry should be the abstract one of whether the right to discovery exists.

[14] The *Schill Steel* panel left open whether its rule would apply to Board proceedings as well, 408 F. 2d at 808, as did *Morgan Precision Parts* v. *NLRB,* 411 F. 2d 1210, 1214 & n. 5 (CA5, 1971).

[15] We deal with the work product privilege analogy below in addressing the Board's claim under exemption 5. We see no reason why the analogy should provide for any different analysis under exemption 7(A)'s "no earlier or greater access" theory than under exemption 5's express test of "not * * * available by law to a party * * * in litigation with the agency."

Title Guarantee expressly avoided relying on this analogy. 534 F. 2d at 491.

Second, focusing on comparative discovery rights, even if it gave us a clearer answer, would violate the spirit of the procedural reform sought by the Hart amendment. The change, as we have noted above, sought to require a showing that some "specific harm might result to [the government's] case from disclosure," *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1135 (CA4, 1977). If the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted "only to the extent that * * *production * * * would * * * interfere" in some way. We must interpret the exemptions to give meaning to this requirement.

Finally, tying FOIA rights to the discovery rights of the particular plaintiff presents us with a legal conundrum that suggests the improbability of such a congressional intent. In order to apply the comparative discovery test, we must look to the particular needs of the plaintiff (in order to see whether he has shown good cause for production). But the Act mandates release of information "to any person." 5 U.S.C. § 552(a)(3). For this reason, anyone's case is as strong (or as weak) as anyone else's. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S. Ct. 1504, 1513, 44 L. Ed. 2d 29, 43 n. 10 (1975): "[Plaintiff's] rights under [FOIA] are neither increased nor decreased by reason of the fact that it claims an interest in the [documents sought] greater than that shared by the average member of the public." Thus, to hold that certain groups—members of the news media, for example—are the real beneficiaries of FOIA is to create a pecking order unjustified

by the language of the statute.[16] "[A]ll citizens have a right to know" what their government is doing. S. Rep. No. 813, 85th Cong., 1st Sess. 6 (1965).[17]

[4] In sum, we reject "earlier or greater access" as a kind of interference protected against by exemption 7(A). We think that the protection against interference involves a focus not on the rights of the individual FOIA plaintiff but rather on the problems posed to the particular agency proceeding. We thus

[16] On the other hand, neither can Robbins Tire gain any leverage under FOIA from the particular unfairness caused here by what some have referred to as the Board's "trial by ambush," *see Capital Cities Communications, Inc.* v. *NLRB*, 409 F. Supp. 971, 977 (N.D. Cal., 1976).

[17] Our problem here is quite similar to that posed by exemption 5, which expressly allows the withholding of memoranda "which would not be available by law to a party * * * in litigation with the agency." 5 U.S.C. § 552(b)(5). Professor Davis has noted in this context:

"When a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, letting required disclosure depend upon the facts about the particular applicant would violate the provision that disclosure must be made to 'any person.' The agency cannot say that one person is 'any person' but that another person is not." K. Davis, Administrative Law Text § 3A.21, at 83 (1972). As a result, he says, "the courts in giving meaning to the fifth exemption have been guided less by discovery law than by the policies behind the fifth exemption." K. Davis, Administrative Law of the Seventies § 3A.21, at 92 (1976). *See also EPA* v. *Mink*, 410 U.S. 73, 86, 93 S. Ct. 827, 835, 35 L. Ed.2d 119, 131–32 (1973); *Kent Corp.* v. *NLRB*, 530 F. 2d 612, 620–21 & n. 20 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976).

The exemption 5 problem is one posed by statutory language. The analogous difficulty under exemption 7(A) results from the less persuasive context of remarks in the legislative history. We therefore feel more at liberty to fashion our own definition of interference.

proceed to an examination of the possible harms that could befall Board proceedings by pretrial disclosure of witnesses' statements.[18] Indeed, a precise reading of *Title Guarantee* reveals that this was the approach taken there. Although, as we have noted, Judge Oakes referred to the expansion of discovery rights, his finding of exemption arose not from the mere conclusion that such rights would otherwise be expanded but from the doubt that Congress intended to so expand them in view of a (judicially perceived) likelihood for interference in the proceedings that might result:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress could be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery.

534 F. 2d at 491–92 (footnotes omitted). Senator Hart's second sentence in his aforementioned explanation of

[18] The Board has the burden of proving any such harm. 5 U.S.C. § 552(a)(4)(B).

what he meant by interference (a diminished ability to collect investigatory information) suggests a similar judicial inquiry into the precise nature of the harm to the agency's case.[19]

As we have noted, *Title Guarantee* involved a request for copies of all statements, without regard to whether the affiants would be called to testify. Part of the rationale for denying the right to disclosure was "the delicate relationship which exists between employer and employees.[20] *See also Roger J. Au & Son, Inc.* v. *NLRB*, 538 F. 2d 80, 83 (CA3, 1976) ("peculiar character of labor litigation"); *Climax Molybdenum Co.* v. *NLRB*, 539 F. 2d 63, 65 (CA10, 1976) ("relationship between employer and employee is a delicate one which calls for limitations on discovery"). There is inherent in this concern an assumption that the Board would be unable

[19] We do not interpret *U.S.* v. *Murdock*, 548 F. 2d 599, 602 (CA5, 1977), as requiring any different conclusion here. The *Murdock* panel, dealing with a FOIA plaintiff being prosecuted for criminal tax violations, did go so far as to say:

"We hold the discovery provisions of the Federal Rules of Criminal Procedure and the FOIA provide two independent schemes for obtaining information through the judicial process. Although information obtained through the FOIA may be useful in a criminal trial, we find that the FOIA *was not intended* as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure." (Emphasis supplied.)

As in *Title Guarantee*, which *Murdock* cited, we think the underlying rationale lay not in the comparison of discovery rights per se but rather on the special dangers that discovery would pose to a criminal prosecution. These were so great that Congress could not possibly have intended disclosure. Whether the dangers in this different context are similar is a question we address below.

[20] Indeed, the peculiar problem of intimidation involved in such a relationship explains why the court restricted its holding to NLRB settings. 534 F. 2d at 492.

to obtain testimony from employees to aid in its prosecution if their statements would become the knowledge of their employer. Even discounting the problem that we do not know which of the affiants here are employees,[21] this sweeping assumption of intimidation is inappropriate here, where the request is limited to statements of witnesses. As this court said in *Schill Steel,* "Informers who actually testify * * * surface automatically." 408 F. 2d at 805.[22] As the First Circuit admitted in *Goodfriend,* "it may well be that [such] circumstances minimize the possible interference with the pending proceedings." 535 F. 2d at 147.[23]

In the present situation, there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness during the five days prior to the hearing,[24] done in an effort to silence him or dilute the nature of his testimony. Such harassment would constitute an unfair labor practice under 29 U.S.C. § 158(a)(4) [25]

[21] *Title Guarantee* involved employee and union affiants, making no distinction in protecting the statements from disclosure because the court felt that union representatives might also be intimidated, through premature disclosure of their negotiating position. 534 F. 2d at 485, 491. *But cf. Harvey's Wagon Wheel, Inc.* v. *NLRB,* 550 F. 2d 1139 (CA9, 1976) (remanding on this point).

[22] *Schill Steel* distinguished *NLRB* v. *Clement Bros. Co.,* 407 F. 2d 1027 (CA5, 1969), in part on the basis that the intimidation problem there resulted from the fact that the discovery sought included statements of non-witnesses, *id.* at 1030–31.

[23] In that case the court found interference in the fact that the respondent would gain discovery rights.

[24] Harassment after testimony at trial, of course, would be as likely for a witness with or without prehearing disclosure.

[25] "(a) It shall be an unfair labor practice for an employer—

* * * * * * *

NLRB v. *Scrivener,* 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). Any attorney interrogation of the affiants extending beyond "that legitimately necessary for the preparation of respondent's defense" to the underlying unfair labor practice charge would run a risk of incurring section 8(a)(1) liability. *See, e.g., NLRB* v. *Ambox, Inc.,* 357 F. 2d 138, 141 (CA 5, 1966); *Texas Industries, Inc.* v. *NLRB,* 336 F. 2d 128, 132–34 (CA 5, 1964); *NLRB* v. *Hardeman Garment Corp.,* 557 F. 2d 559, 563 n. 9 (CA 6, 1977). Nevertheless, post hoc discipline does not necessarily dissipate the anxieties of those upon whom the intimidation may be visited. We understand the Board's position in this regard, dependent as it is upon charges initiated by others before it issues its complaints. See *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 138–39, 95 S. Ct. 1504, 1510–1511, 44 L. Ed. 2d 29, 40–41 (1975).[26]

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter; * * *"

[26] On petition for rehearing in *NLRB* v. *Schill Steel Prods., Inc.,* 408 F. 2d 803, 807–08 (CA5, 1969), a panel of this court discounted this problem of intimidation during the period between discovery and trial:

"In the petition here the Board asserts that the prospect of prehearing discovery is somehow more intimidating than the prospect of discovery under the Jencks Act because it will give the employer more time to confront the informing employee. Given that the name of an informer will be revealed, we confess that we are unable to see the connection between added time and substantially greater coercion."

Id. at 807. We reach our conclusion here without considering whether we could draw the same conclusion about human nature as a matter of law in every Board proceeding as opposed to the rather unique context there of discovery in our own court. *See* note 14, *supra.*

[5, 6] However, the Board has not introduced any evidence tending to show that this kind of intimidation (either to physical or employment security) is likely to occur during the five days between discovery and the Board hearing in this case. While we do not purport to establish an exclusive set of criteria for looking at this question, there are numerous factors that bear upon such an inquiry: whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give. *See Temple-Eastex, Inc.* v. *NLRB,* 410 F. Supp. 183 (E.D. Tex., 1976) (ordering disclosure of witness statements favorable to employer).[27] Instead, the Board has asserted that in every case the potential for intimidation is so great as to require nondisclosure of all statements and affidavits. This sort of per se approach to exemption 7(A) is inconsistent with the procedural

[27] The answers to some of these sorts of questions might require in camera inspection pursuant to 5 U.S.C. § 552(a)(4)(B). *Cf. Kent Corp.* v. *NLRB*, 530 F. 2d 612, 624 n. 30 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d. 287 (1976).

Whether or not courts are "ill-fitted to make such determinations," *Climax Molybdenum Co.* v. *NLRB*, 539 F. 2d 63, 85 (CA10, 1976), is irrelevant in the face of what we perceive to be a congressional directive to do so. According to one commentator, even the experts have "strongly held and widely disparate opinions on the reality of employee fear as an inhibiting factor in securing statements from witnesses." 51 St. John's L. Rev. 251, 268 n. 92 (1977).

reform effected by the Hart amendment. FOIA requires disclosure absent the agency's ability to prove[28] the applicability of exemption 7(A) in the context of the particular proceeding involved. We hold that the Board has not sustained its burden of proving that the possibility of intimidation in this case through disclosure to Robbins Tire brings exemption 7(A) into play.[29]

EXEMPTION 7(C)

[7] Exemption 7(C) protects these statements and affidavits from disclosure only to the extent that production would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The district court rejected this claim since (1) Robbins Tire seeks disclosure only of statements taken from those scheduled to testify at the Board hearing and (2) the Board's own rules[30] allow disclosure of the statements after the direct examination of the witnesses at that hearing.

[28] The Board's per se rule would not satisfy the burden FOIA imposes even if it had resorted to the sort of conclusory affidavit employed to provide "evidence" of inevitable intimidation in *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F. 2d 1139, 1142 (CA9, 1976). The statutory scheme requires proof of adjudicative, not legislative, facts.

[29] It might be argued that the mere delay that this FOIA suit creates to the Board process of enforcing the provisions of the NLRA constitutes exemption 7(A) interference. *New England Medical Center Hosp.* v. *NLRB*, 548 F. 2d 377, 384 (CA1, 1976). But giving such scope to this exemption would result in a per se rule that any FOIA suit designed to obtain investigatory files would fail if it coincided with a scheduled hearing. For the reasons we have indicated, we think this result inconsistent with the intent of the statute as amended.

[30] 29 C.F.R. § 102.118(b)(1) (1976). This rule, which is modeled after the Jencks Act, 18 U.S.C. § 3500, applies as well to representation cases. 29 C.F.R. § 102.118(c) (1976).

We agree. The Board concedes that there is nothing unusual in the nature of personal or family details in these affidavits that suggests the need for protection. *See Title Guarantee,* 534 F. 2d at 489 n. 10 (dictum). In addition, as the district court noted, this is purely a matter of when the witnesses' statements are to be revealed, and there is therefore no privacy interest involved. "Disclosure of this same information is not an unwarranted invasion of the claimants' privacy simply because it occurs before the hearing." *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1136 (CA4, 1977). Accordingly, we need not engage in balancing privacy rights against the right of the public to be informed. *Cf. Department of the Air Force* v. *Rose,* 425 U.S. 352, 370–82 & n. 16, 96 S. Ct. 1592, 1603–1609 & n. 16, 48 L. Ed. 2d 11, 26–33 & n. 16 (1976) (exemption 6).

EXEMPTION 7(D)

[8] This exemption protects against disclosure that would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The Board asserts that section 10058.4 of its Case Handling Manual requires that the affiant "should be told the truth—that the information would be used by us in ascertaining the total picture and that this would be its only use unless and until he might be called on to give information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information." We do not know whether this "express assurance" was given here, and we question how unconditional an assurance of confidentiality it is anyway. However, employee-employer context might in some situations provide "circumstances from which such an assurance could be reasonably inferred."[31] *Cf. Texas Industries, Inc.* v. *NLRB,* 336 F. 2d 128, 134 (CA 5, 1964) (importance of preserving confidentiality of employee statements). However, as the district court held, the Board's case under exemption 7(D) fails for the same reason that exemption 7(C) fails: all the statements sought here come from those who are scheduled to testify at trial anyway. If one's identity is certain to be disclosed, we cannot characterize him as one of the sources given either express or implied assurance of confidentiality.[32]

[31] We draw these explanations of what may create confidentiality from language in the conference report on the 1974 amendments to the FOIA:

"The substitution of the term 'confidential source' in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information." Source Book 230 (Conf. Rep. No. 93–138, 93d Cong., 2d Sess. (1974)).

Of course, here the Board has offered no specific evidence concerning the Robbins Tire situation from which a court might draw such a reasonable inference. *See Title Guarantee,* 534 F. 2d at 489–90 n. 11 (dictum). Its exemption 7(D) position, like its positions regarding the exemptions already discussed, is a per se one. But the question here, too, is ordinarily one of fact. *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1137 (CA4, 1977).

[32] *Cf. Climax Molybdenum Co.* v. *NLRB,* 407 F. Supp. 208, 209 (D. Colo., 1975), *aff'd on other grounds,* 539 F. 2d 63 (CA10, 1976); *accord, Mylan Pharmaceuticals, Inc.* v. *NLRB,* 407 F. Supp. 1124,

Finally, the Board asserts that the statements and affidavits taken from prospective witnesses are protected from disclosure by exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). In contrast with its position on exemption 7(A), the Board has not met with much success with this argument. *See Title Guarantee,* 534 F. 2d at 492–93 n. 15 (dictum); *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1138, (CA4, 1977); *Marathon LeTourneau Co.* v. *NLRB,* 414 F. Supp. 1074, 1080 (S.D. Miss., 1976).

Exemption 5, which unlike exemption 7 remained unchanged by the 1974 amendments, has been held to encompass the work-product privilege of *Hickman* v. *Taylor,* 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 154, 95 S. Ct. 1504, 1518, 44 L. Ed. 2d 29, 49 (1975); *Kent Corp.* v. *NLRB,* 530 F. 2d 612, 618 (CA5), *cert. denied,* 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976). The basic disagreement between the Board and Robbins Tire here is whether the distinction between "factual" and "deliberative" materials fashioned in *EPA* v. *Mink,* 410 U.S. 73, 87–88, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119, 132 (1972), in connection with executive privilege was intended to be or can be extended to cases involving the work-product privi-

1127 (W.D. Pa., 1976). These cases argue that all interviewees are potential witnesses and that they therefore can never be considered confidential sources. We do not express an opinion on the applicability of exemption 7(D) with respect to statements of those not scheduled to be called at the Board hearing.

lege. If in fact Congress means to incorporate *Hickman* in all its complexity into exemption 5 as a sort of direct legal transplant, the witness statements in this case would be exempt from disclosure, for *Hickman* protected even relevant and non-privileged witness statements unless production "is essential to the preparation of one's case." 329 U.S. at 511, 67 S. Ct. at 394, 91 L. Ed. 2d at 462. Since as we have noted FOIA prohibits looking at the needs of the particular plaintiff in ruling on the applicability of the exemptions, such statements would not "normally" or "routinely" be disclosed in private litigation. *Sears,* 421 U.S. at 149 & n. 16, 95 S. Ct. at 1515 & n. 16, 44 L. Ed. 2d at 46 & n. 16, *citing* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). On the other hand, if *Hickman* as applied to exemption 5 does not protect factual materials, these statements would have to be disclosed. They constitute purely factual testimony regarding events at the plant.

[9] We think that the *Hickman* privilege as read into exemption 5, like the executive privilege, must be applied consistently with Congress' intent to protect only against disclosure of governmental policy-making processes.[33] The general concern surrounding exemption 5 was to guard against stifling flexibility of viewpoints before agencies arrive at final institutional decisions. As the House Report noted the exemption was a response to testimony from agency witnesses

[33] As noted above, we must construe FOIA exemptions narrowly. *Rose,* 425 U.S. at 360–61, 95 S. Ct. at 20–21, 48 L. Ed. 2d at 21. With respect to exemption 5 in particular, see S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) ("The committee * * * has attempted to delimit the exception as narrowly as consistent with efficient Government operation.").

> that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl."

H.R. Rep. No 1497, 89th Cong, 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News, pp. 2418, 2427.[34] Since the purpose of exemption 5 was to protect agency deliberative processes, purely factual material such as verbatim witness statements must not fall within it, whether the agency urges upon us the executive or the work-product privilege. *See Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1138 (CA4, 1977).

[10] While the *Mink* Court spoke in the more conventional exemption 5 context of an assertion of executive privilege, we do not interpret its discussion to be restricted to that context. The Court described in some detail the difficult language as well as the legislative history of exemption 5. While noting the problems involved in applying discovery analogies without inquiring as to individual need,[35] the Court observed that one thing about exemption 5 was certain: "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection.'" 410 U.S. at 86, 93 S. Ct. at 836, 35 L. Ed. 2d at 132.[36]

[34] *See also* Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi. L. Rev. 761, 795 & n. 88 (1967); Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 Harv. L. Rev. 1047, 1049 & nn. 11–12 (1973).

[35] *See* note 17, *supra.*

[36] Cf. Sears, 421 U.S. at 154, 95 S. Ct. at 1518, 44 L. Ed. 2d at 49: "Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy."

Justice White supported this position by citing the House and Senate reports to which we have referred. He then articulated the deliberative-factual distinction, and in doing so cited cases such as *Soucie* v. *David,* 448 F. 2d 1067 (CADC, 1971). *Soucie* was not confined to the executive privilege context; there the D.C. Circuit was promulgating broad guidelines for the handling of the exemption 5 issue on remand. *See also Bristol-Myers Co.* v. *FTC,* 424 F. 2d 935 (CADC), *cert. denied,* 400 U.S. 824, 91 S. Ct. 46, 27 L. Ed. 2d 52 (1970) (cited in *Mink*). Finally, Justice White explained that the first version of exemption 5 had definitively exempted only "memorandums or letters dealing solely with matters of law and policy."[37] The only reason for the change in final wording was not to weaken this deliberative-factual distinction but to assure that factual material inextricably intertwined with deliberative material would also be exempt. *Mink,* 410 U.S. at 90–91, 93 S. Ct. at 837, 35 L. Ed. 2d at 134. *Mink's* extensive analysis of exemption 5 as a whole shows that the case should properly be read as an exemption 5 case, not simply an executive privilege case. It paints with a broad brush, like other decisions both before and after it. *See, e.g., National Courier Association* v. *Board of Governors,* 516 F. 2d 1229, 1242 (CADC, 1975); *Schwartz* v. *IRS,* 511 F. 2d 1303, 1305 (CADC, 1975); *Tennessean Newspapers, Inc.* v. *FHA,* 464 F. 2d 657, 660 (CA6, 1972); *Soucie, supra; GSA* v. *Benson,* 415

[37] In fact, S. Rep. No. 1219, 88th Cong., Sess. 13–14 (1964), accompanying this version noted that "there is no exemption for matters of a factual nature."

F. 2d 878 (CA9, 1969). This court has described exemption 5 in the following way:

> THE "MEMORANDUM" EXCEPTION
>
> * * * Whatever may be the scope of this exception, with its cryptic limiting phrase "which would not be available by law to a party other than an agency in litigation" * * * we think it would be a perversion of the Act to classify the materials sought in this case [OSHA training manuals] as within this provision which is designed to encourage the free exchange of ideas among government policy-makers. It was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum. *Bristol Myers Co.* v. *F.T.C.*, 424 F. 2d 935 (D.C. Cir.), cert. denied, (1970). Substance not form determines its availability by the public. * * * The subject manual is an impersonal, mass-produced statement of established policy designed to be utilized as an educational and reference tool, not for policy-making or deliberative purposes. If this material be a "memorandum" then the term would cover virtually all government documents of any description or nature. Such an interpretation would be at war not only with the plain meaning of the word but also with the spirit and purpose of the Act. Whatever the ultimate scope of this "memorandum" exception may be, we are confident that these materials would remain without its reach.

Stokes v. *Brennan,* 476 F. 2d 699, 703–04 (CA5, 1973). There is no suggestion here that the factual-deliberative distinction only defines the scope of the executive privilege. It is inherent in the purpose of exemption 5.

Indeed, we suggested the answer to this case in *Kent Corp.* v. *NLRB,* 530 F. 2d 612, 623–24 (CA5), *cert. denied,* 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976), in which we held protected under exemption 5 "final investigation reports" prepared by NLRB staff members. These reports summarized the evidence of unfair labor practices (gained by witness interviews such as those actually requested here) and recommended dispositions as to the various charges. Discussing the work-product privilege and *Hickman,* we held that even the factual information contained in these reports was protected. But our approach emphasized the deliberative nature of the report process into which these facts were integrated and contrasted these documents with the precise sort of "primary information" that is involved in this case:

> In our view, even the factual matters in these reports (which might not be protected by executive privilege) are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor,* 329 U.S. at 511, 67 S.Ct. at 393, 91 L. Ed. at 462. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials.
>
> This case is a particularly strong one for recognizing the privilege. *The contents of the reports are not primary information, such as verbatim witness testimony or objective data,* but rather are mainly reports on how the Birmingham attorneys appraised the evidence they found.

> Thus the reports consist largely of "mental impressions, conclusions, opinions, [and] legal theories" within the meaning of the Federal Rule. Such materials, if prepared in anticipation of litigation or for trial, are always protected by a properly-raised claim of work product privilege, regardless of the opposing litigant's need.

530 F. 2d at 624 (emphasis added).

Mink, Stokes, and *Kent* all admit the difficulties involved in administering a statutory standard that ordinarily turns on individual need but prohibits courts from assessing such factors in the FOIA context. *See* note 17, *supra.* Whether as in *Stokes* we resolve the problem by focusing on the word "memorandum" and concluding that factual witness statements are not encompassed within that term,[38] or whether we conclude that in constructing its exemption 5 discovery analogy Congress had no inkling of the ramifications of the qualified part of the *Hickman* privilege,[39] we cannot reconcile withholding these statements with exemption 5's narrow policy of safeguarding the thought processes of the agency as an institutional thinker.

The Board has failed to sustain its statutory burden of proof as to exemptions 7(A), 7(C), 7(D), and 5. The district court's order compelling disclosure is affirmed.

AFFIRMED.

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[38] *See also Title Guarantee Co.* v. *NLRB*, 407 F.Supp. 498, 502 (SDNY), *rev'd on other grounds*, 534 F. 2d 484 (CA2), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

[39] For a fuller description of these two approaches, see Note, supra, note 34, at 1049–51.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 76–2099

D.C. Docket No. CA76–H–528 NW

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE,

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Northern District of Alabama

Before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS, *District Judge**

*Senior District Judge of the Southern District of Florida, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was urged by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1977.

Issued as Mandate: December 13, 1977.

APPENDIX C

In the United States District Court for the Northern District of Alabama, Northwestern Division

ROBBINS TIRE AND RUBBER COMPANY, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD, DEFENDANT

CA76–H–528–NW

MEMORANDUM OF DECISION

This cause came on for hearing on April 15, 1976, on the request by plaintiff for a preliminary injunction and on the motion by defendant to dismiss, or, in the alternative, for summary judgment. Since all parties agreed that the issues presented are legal, not factual, the court entered an oral order under Rule 65 of the Federal Rules of Civil Procedure directing that the trial of this action on the merits be advanced and consolidated with the hearing on April 15, 1976, on the application for a preliminary injunction.

The following is a brief summary of the facts which are not in dispute. In connection with its investigation of a contested election and its investigation of an unfair labor practice charge, defendant secured certain affidavits and/or written statements of various individuals. On March 26, 1976, the Board set down for hearing on April 27, 1976, the complaint predicated upon the unfair labor practice charge. April 27, 1976 is also the date of the hearing concerning issues raised by the election contest.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), and defendant's rules and regulations, 29 C.F.R. § 102.117(c)(1), plaintiff on March 31, 1976, in writing requested of the Board's Acting Regional Director:

> "that copies of all written statements, signed or unsigned, contained in the Board's case files *with respect to those witnesses which the Board will call to testify* at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)." (Emphasis added.)

Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request.

By letter dated April 2, 1976, the Acting Regional Director of the Board denied plaintiff's request, asserting that the statements which were requested were privileged from disclosure by exemptions 5 and 7(A), (C) and (D) of § 552(b) of Title 5 of the United States Code. On April 8, 1976, plaintiff appealed the determination to the Board's General Counsel who has not ruled on such appeal and who is not required so to do prior to the scheduled hearing on April 27, 1976. Thereafter the complaint was filed herein which invoked this court's jurisdiction under 5 U.S.C. § 552 (a)(4)(B).

Normally a court will require the exhaustion of administrative remedies prior to entertaining jurisdiction of an action complaining of agency action. But this exhaustion principle is not without its exceptions and exhaustion rests within the sound discretion of the court. See *Ecology Center of Louisiana, Inc.* v. *Coleman,* 515 F. 2d 860 (5th Cir. 1975). Here plaintiff has promptly taken all steps available to it to

pursue its administrative review, and the court finds that the factors normally to be considered in an exception to the exhaustion principle are in plaintiff's favor here. See *McKart* v. *United States,* 395 U.S. 185 (1969). Thus, for the reason stated by the court into the record during the oral hearing on April 15, 1976, this court is of the opinion that jurisdiction has been properly invoked under the Freedom of Information Act without plaintiff being required further to exhaust its administrative review. The facts in this case are different than those in *Federal-Mogul Corporation* v. *National Labor Relations Board,* CA75–H–1945–J, decided by this court on October 17, 1975. In *Federal-Mogul* plaintiff sought to invoke this court's jurisdiction under somewhat similar circumstances, but plaintiff there had not appealed the decision of the Board's Regional Director to the Board's General Counsel either prior to initiating the action or prior to the hearing on the requested preliminary injunctive relief. Here plaintiff has promptly done all within its power to secure final agency action.

In its complaint plaintiff essentially seeks two types of relief. First, plaintiff seeks the information it requested of defendant on March 31, 1976, and secondly, plaintiff seeks an injunction against the scheduled April 27, 1976 hearing. With regard to this second request, the court is aware of the reluctance of district courts to enjoin proceedings before the National Labor Relations Board except in those rare and well defined instances where the Board may be engaged in acts which are either contrary to specific prohibitions of the National Labor Relations Act or which are in excess of its delegated powers. Neither situation is presented by the instant case, and while a violation of the Freedom of

Information Act may be another exception to the general rule, enjoining proceedings before the Board is not appropriate where other, more normal relief will be sufficient. The court is of the opinion that plaintiff may be adequately protected by required production of information to which it may be entitled under the Freedom of Information Act without the assistance of an injunction directed at the April 27, 1976 hearing, and thus plaintiff will suffer no irreparable injury by the hearing.

It is important to note that the Board does not claim that there is something unusual about the affidavits or statements or that there is something within them that would cause them to be anything other than an average statement obtained during a routine investigation. The Board's attorney stated during the oral hearing on April 15, 1976 that, for the purposes of deciding this case, the court could assume that the Board's position is predicated simply upon the fact that the statements were obtained in connection with a pending matter. Thus, an *in camera* inspection of the statements will not be necessary.

There is no dispute that plaintiff is entitled to the information it has requested unless defendant can discharge the burden it has of establishing that the information falls within one of the specific exemptions contained in the Act. Even prior to the 1974 Amendment to the Freedom of Information Act, the Fifth Circuit Court of Appeals had established that the disclosure of material in government files was the rule, not the exception, and that the Act was intended to increase public access to records except under specific, narrowly constructed exemptions. *Stokes* v. *Brennan,* 476 F. 2d 699 (5th Cir. 1973). Certainly no less can be said for

the Freedom of Information Act following the 1974 Amendment.

The first exemption defendant seeks to assert is the one established by 5 U.S.C. § 552(b)(5) for inter-agency or intra-agency memorandums or letters. The Board does not argue that the statements and affidavits are in the form of "memorandums" or "letters." See *Bellingham Frozen Foods* v. *Henderson,* 91 LRRM 2761 (W.D. Wash. 1976). Neither does the Board urge that the statements and affidavits possess a deliberative, as opposed to factual quality. See *Title Guarantee Company* v. *N.L.R.B.,* 90 LRRM 2849 (S. D. N.Y. 1975) [rev'd on other grounds, —— F. 2d —— (2nd Cir. 1976)]. And this court is of the opinion that normal, routine affidavits and statements taken from persons not employed by the Board during a typical investigation by the Board are not embraced in the § 552(b)(5) exemption. See *Stokes* v. *Brennan,* supra.

As noted earlier, counsel for the Board acknowledged during the April 15, 1976 hearing that there is nothing unusual about or contained in the affidavits and statements which it declines to supply. Thus in urging an exemption under § 552(b)(7)(C) or § 552(b)(7)(D), the Board must be able to support a position that any statement or affidavit which it holds in connection with an open file is embraced within one of such exemptions. This it cannot do. The Board does not discharge the burden cast upon it in claiming one of such two exemptions simply by showing that the writing sought is in affidavit or statement form taken from a person who will testify at a forthcoming hearing. See *Bellingham Frozen Foods* v. *Henderson,* supra. This is particularly true where, as here, the

only statements or affidavits sought are from persons who will be called to testify at the April 27, 1976 hearing and under the Board's own rules, affidavits and statements of any witness must be supplied immediately after the witness has testified. 29 C.F.R. § 102.118(b)(1).

The final matter to be considered is the one exemption the Board asserts most strongly and the one, if any, to which it may be entitled. 5 U.S.C. § 552(b)(7)(A). Defendant relies primarily upon the recent decision of the Second Circuit Court of Appeals in *Title Guarantee Company* v. *N.L.R.B.,* —— F. 2d —— (2nd Cir. 1976). There, Title Guarantee Company had requested copies of *all* written statements contained in the Board's file and any such statements subsequently available to the Board. Satisfying the burden of demonstrating that this broad request interferes with the Board's enforcement proceedings (where none of the persons who gave the statements might be called as witnesses and thus where none of the statements might ultimately be supplied to the company under the Board's own rules) is substantially easier than satisfying the burden the Board bears in the instant case where the *fact* of disclosure of the statements is not the issue but simply the *time* at which the disclosure will be made. The request here is limited only to those statements of persons who will testify and thus the Board will be required by its own rules immediately after the testimony is given to deliver the statements here in issue to plaintiff. 29 C.F.R. § 102.118(b)(1). And the Board has not demonstrated how the delivery to plaintiff several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceed-

ings of the Board where, in connection with those proceedings, the Board by its own rules will be required to give the statements and affidavits to plaintiff. The court is therefore of the opinion that the defendant should be required to supply the information requested in writing by the March 31, 1976 letter. An appropriate order will be entered.

Done this 16th day of April, 1976.

JAMES H. HANCOCK,
United States District Judge.

APPENDIX D

In the United States District Court for the Northern District of Alabama, Northwestern Division

ROBBINS TIRE AND RUBBER COMPANY, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD, DEFENDANT

CA76–H–528–NW

ORDER

In accordance with the Memorandum of Decision this day entered, it is hereby *ordered, adjudged, decreed* and *declared* that the information sought by plaintiff, i.e., written statements now or hereafter contained in the Board's case filed with respect to those witnesses which the Board will call to testify at any hearing in Cases Nos. 10–CA–11762 and 10–RC–10410, constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), with respect to which plaintiff is entitled to inspection and copying.

It is further ordered, That the Board shall turn over to the plaintiff copies of the material sought by plaintiff in its letter of March 31, 1976, for inspection and copying on or before April 22, 1976, or, at the election of the Board, on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness.

It is further ordered, That costs are taxed against defendants.

Done this 16th day of April, 1976.

JAMES H. HANCOCK,
United States District Judge.

APPENDIX E

NATIONAL LABOR RELATIONS BOARD,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., April 15, 1976.

Re: Robbins Tire & Rubber Company, Cases Nos. 10–CA–11762, 10–RC–10410.

WILLIAM M. EARNEST, Esquire,
Elarbee, Clark & Paul,
Suite 750, Coastal States Bldg.,
Atlanta, Ga. 30303.

DEAR MR. EARNEST: Your appeal from the Regional Director's refusal to furnish information you had requested by letter dated March 31, 1976, has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of April 2, 1976. Your request was construed as a pretrial discovery tactic beyond the scope of the Freedom of Information Act (hereafter, "FOIA"). *Renegotiation Board* v. *Bannercraft,* 415 U.S. 1. In this regard, the Congressional intent was to keep litigants from having greater access to file information than already existed. Inasmuch as the purpose of the FOIA was not intended to be for discovery of our file contents, and noting that the Board's Rules do not provide for discovery of any of the information you seek, the request must be denied. See *Interboro Contractors, Inc.* v. *N.L.R.B.,* 432 F. 2d 854, 857–860 (C.A. 2, 1970), cert. den., 402 U.S. 915, and *Electromec Design & Development Co.* v. *N.L.R.B.,* 409 F. 2d 631 (C.A. 9, 1969).

With respect to exemption 7(A), please be advised that the Court of Appeals for the Second Circuit in *Title Guarantee Co.* v. *N.L.R.B.*, No. 75–6119 (C.A. 2, April 2, 1976), recently upheld the Board's position that the pretrial discovery of affidavits would frustrate Agency proceedings by permitting respondents to construct defenses which would permit violations to go unremedied. In addition, the Court held that such discovery would inhibit individuals from giving information to the Board. See also, *Climax Molybdenum Co.* v. *N.L.R.B.*, 90 LRRM 3126; *Mylan Pharmaceuticals, Inc.* v. *N.L.R.B., Civ.* Action No. 76–79 (W. Pa., Jan. 28, 1976); *Harvey's Wagon Wheel, Inc., et al.* v. *N.L.R.B.*, Civ. Action No. C–75–2487 S.AW. (N.D. Cal., Feb. 5, 1976); *Capital Cities Communications Inc.* v. *N.L.R.B.*, Civ. Action No. C–75–2352 W.H.O. (N.D. Cal. Feb. 19, 1976) and *Russell Stover Candies, Inc.* v. *N.L.R.B.*, 89 LRRM 2670 (U.S.D.C. W.D. Mo.). In addition to those cases cited by the Regional Director in support of exemption 5, see also, *Jamco International, Inc.* v. *N.L.R.B.*, 91 LRRM 2446 (D.C. N. Okla., 1976), and *Hook Drugs, Inc.* v. *N.L.R.B.*, Civ. Action No. IP 76–24–C (S.D. Ind., March 5, 1976). Finally, with respect to this Agency's refusal to "sanitize" the requested information, it is our belief that such an undertaking would be impractical since it is impossible to determine exactly what part of the information would need to be deleted in order to protect our enforcement proceedings, any privacy privileges or our confidentia! sources.

Robert E. Allen, at the direction of and pursuant to the policies established by General Counsel John S. Irving, is responsible for the determination that the records you requested are privileged from disclosure under the FOIA.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

JOHN S. IRVING,
General Counsel.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
MAR 15 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 23, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE

1976

4.15.76 Complaint filed with acceptance of service for deft by Mr. William E. Caldwell

4.15.76 Application of plff for temporary restraining order filed

4.15.76 Affidavit of William M. Ernest filed

4.15.76 Certificate of service filed

4.15.76 Motion of deft to dismiss complaint and request for injunctive relief, or in the alternative for summary judgment filed—served in open court by counsel

4.15.76 Opposition of deft to complaint and request for injunctive relief filed—served in open court by counsel

4.15.76 On hearing on application for temporary restraining order before the Hon. James H. Hancock at Birmingham, AL (JOHN WEAVER, reporting)—court's preliminary statements—attorney's statements to the Court—no testimony heard—the Court orders that the hearing on the merits is hereby advanced and consolidated with application for injunctive relief, and taken under advisement

4.15.76 Clerk's Court Minutes entering judgment on decision by the court that his matter is taken under advisement—filed and entered

4.16.76 Memorandum of decision, filed and entered. JHH. cm

DATE

1976

4.16.76 Order adjudging, decreeing and declaring that the information sought by plaintiff constitutes public information within the meaning of the Freedom of Information Act, with respect to which plaintiff is entitled to inspection and copying, and ordering that the Board shall turn over to the plaintiff copies of said material on or before Apr 22, 1976, or, at the election of the Board, on or before a date which is at least 5 days prior to any hearing, etc., and taxing costs to the defendants, filed and entered, JHH cm

4.22.76 Notice of appeal of deft from judgment entered Apr 16, 1976 filed—cs (certified copies mailed to USCA and attys)

4.27.76 Certified record on appeal mailed to USCA (certified copies of docket entries mailed to attys with letter)

4.20.76 Emergency Motion for stay pending appeal, filed

4.22.76 Response to Emergency motion for stay of appeal, filed

4.26.76 Order denying Emergency Motion, dated

11.21.77 Decision of the Court of Appeals, dated

11.21.77 Judgment of the Court of Appeals, dated

2.21.78 Order of the Supreme Court granting certiorari

[April 13, 1976]

* * * * *

[3]

COMPLAINT

Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, for its Complaint against the Defendant, NATIONAL LABOR RELATIONS BOARD (hereinafter also "the Board"), respectfully alleges as follows:

I. NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act to require public disclosure of statements and affidavits obtained by agents of the National Labor Relations Board during the Board's investigation of an unfair labor practice charge against the Plaintiff resulting in the issuance of a Board complaint and during the Board's investigation of objections to a representation election. Plaintiff seeks herein injunctive relief against Board proceedings pending such disclosure.

II. JURISDICTION

2. This Court has jurisdiction of this action pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(B), the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, and the All Writs Statute, 28 U.S.C. § 1651.

[4]

III. THE PARTIES

3. Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of, the State of Alabama, with its principal offices and place of business located at Sixth Street, in the County of Colbert and State of Alabama.

4. Plaintiff is, and has been at all times material herein, engaged in the manufacture and sale of rubber products in the State of Alabama.

5. Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, is a member of the public within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), and a person within the meaning of that statute, 5 U.S.C. § 552(a)(3), as well as of the Administrative Procedure Act, 5 U.S.C. § 551(2).

6. Defendant, NATIONAL LABOR RELATIONS BOARD, is an administrative agency of the United States Government, created pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.*, with its principal offices located at 1717 Pennsylvania Avenue, N.W., in the City of Washington, District of Columbia.

7. Defendant Board and its agents constitute an "agency" with the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(e).

IV. FACTUAL ALLEGATIONS

8. On August 7, 1975, the Aluminum Workers International Union, AFL-CIO (hereinafter "Aluminum Workers", a labor organization, filed in Case No. 10-RC-10410 a Petition for an election (EXHIBIT A hereto). Pursuant to a Stipulation for Certification Upon Consent Election, approved by the Board's

Acting Regional Director on August 29, 1975, a secret ballot election was conducted on October 9, 1975 among employees in the appropriate voting unit.

9. On October 16, 1975, the Aluminum Workers filed objections to the election and an investigation of these objections was subsequently made by agents of the Board. During this investigation, agents of the Board secured affidavits and/or written statements of various individuals. After completing the investigation, the Board's Regional Director on February 11, 1976, issued his Report on Challenged Ballots and Objections (EXHIBIT B hereto).

10. On April 6, 1976, the Board adopted (EXHIBIT C hereto) the Regional Director's Report on Challenged Ballots and Objections, which directed that a hearing be held if the Aluminum Workers, after challenged ballots were opened, did not receive a majority of the valid votes cast. The Aluminum Workers did not receive such a majority and a hearing has been set for April 27, 1976, concerning issues raised by the election objections.

11. On February 4, 1976, Gene E. Newton, an individual, filed in Case No. 10-CA-11762 an unfair labor practice charge, alleging that Plaintiff had violated § 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) and (3) (EXHIBIT D hereto).

12. On March 3, 1976, after investigation by agents of the Board during which affidavits and/or written statements were taken of certain individuals, the unfair labor practice charge was amended, deleting the § (a)(3) allegation (EXHIBIT E hereto).

13. On March 26, 1976, the Board's Acting Regional Director issued a Complaint and Notice of Hearing (EXHIBIT F

hereto) against Plaintiff herein, alleging some forty (40) instances of alleged violations. The hearing on these allegations has been set for April 27, 1976.

14. On March 31, 1976, Plaintiff herein duly interposed its Answer to the Complaint, denying the material allegations of the Board Complaint. A copy of Plaintiff's Answer to the Complaint is attached hereto as EXHIBIT G.

15. Pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), and the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.117(c)(1), Plaintiff on March 31, 1976 by hand delivered letter requested of the Board's Acting Regional Director Cohen that copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the April 27, 1976 hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 be made available for inspection and copying by Plaintiff at least seven (7) days prior to the start of

the hearing. Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request. A copy of Plaintiff's request is attached hereto as EXHIBIT H.

16. By letter dated April 2, 1976, Acting Regional Director Cohen denied Plaintiff's request, asserting that the statements which were requested "are privileged from disclosure by Exemptions 5 and 7(A), (C) and (D) of Section 552(b) of the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. Section 552(b)(5), 7(A), 7(C) and 7(D)." Acting Regional Director Cohen advised, however, that review of his determination might be had pursuant to 29 C.F.R. § 102.117(c)(2)(ii) by appealing to the Board's General Counsel. Acting Regional Director Cohen's letter is attached hereto as EXHIBIT I.

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17. On April 8, 1976, by air mail, special delivery letter, Plaintiff duly appealed the determination of Acting Regional Director Cohen to the Board's General Counsel, John S. Irving. A copy of this appeal is attached hereto as EXHIBIT J.

18. Even though the Board's General Counsel has not yet ruled on this Plaintiff's appeal, Plaintiff has filed this action now because the hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 is scheduled for April 27, 1976 and the Board's firm policy has been to refuse to produce the type of information sought herein. The Board's later denial of Plaintiff's appeal would prohibit Plaintiff from obtaining prior to the April 27, 1976 hearing the requested information under the Freedom of Information Act.

V. FURTHER ALLEGATIONS

19. Upon information and belief, all of the information sought by Plaintiff is within the provisions of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(3), and is required to be disclosed by the Defendant.

20. Defendant's failure and refusal to furnish the requested information is arbitrary and capricious, and deprives Plaintiff of public information to which it is entitled to access.

21. If Plaintiff does not receive the requested information a reasonable time prior to the hearing scheduled for April 27, 1976 in Board Cases Nos. 10-CA-11762 and 10-RC-10410, Plaintiff will be wrongfully precluded from properly preparing its defense to the allegations contained in the Board's Complaint and those set forth in the Report on Challenged Ballots and Objections. Plaintiff will thereby suffer

[8]

irreparable injury for which no adequate remedy at law exists.

VI. RELIEF REQUESTED

WHEREFORE, for all of the foregoing reasons, Plaintiff prays that this Court order, adjudge and decree that:

1. The information sought by Plaintiff, i.e. written statements now or hereafter contained in the Board's case files with respect to those witnesses which the Board will call to testify at the April 27, 1976 hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), with respect to which Plaintiff is entitled to inspection and copying.
2. Defendant be enjoined from withholding such agency records from Plaintiff.
3. At least seven (7) days prior to the start of the hearing Defendant be required to produce for inspection and copying by Plaintiff such agency records.
4. Defendant Board and its agents be preliminarily enjoined from conducting its administrative hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 now scheduled for April 27, 1976, until the final resolution of the allegations contained herein.

5. Defendant Board and its agents be permanently enjoined from conducting its administrative hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 until at least seven (7) days after Defendant provides the requested statements and/or affidavits to Plaintiff.

6. Plaintiff be awarded reasonable attorneys' fees and other litigation costs reasonably incurred in this action;

and such other and further relief as to the Court may seem reasonable and proper in the circumstances.

And Plaintiff further prays that, in accordance with the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(D), except as to cases the Court considers of greater importance, proceedings herein take precedence on the docket over all

[9]

cases and be assigned for hearing or trial or for argument at the earliest practicable date and expedited in every way.

Respectfully submitted,

POELLNITZ, COX, ROBISON,
MCBURNEY & JONES

By: /s/ C. A. Poellnitz

ELARBEE, CLARK & PAUL

By: /s/ William M. Earnest
Attorneys for Plaintiff

ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

POELLNITZ, COX, ROBINSON, MCBURNEY & JONES
P. O. Box 876
Florence, Alabama 35630
(205) 764-0821

STATE OF ALABAMA)
)
COUNTY OF LAUDERDALE)

Comes Wilmer E. Maddox, Personnel Manager for Robbins Tire and Rubber Company, Inc., the plaintiff herein, who is known to me and who, being first duly sworn, states that the allegations of fact in the foregoing complaint are true and correct, to the best of his knowledge, information and belief.

This the 13th day of April, 1976.

/s/ Wilmer E. Maddox
WILMER E. MADDOX

Sworn to and subscribed before me
on this the 13th day of April, 1976.

/s/ Imogene Ward
Notary Public

[SEAL]

Form NLRB-502
(2-71)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved.
Budget Bureau No. 64-R002.14

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 10-RC-10410

Date Filed 8-7-75

INSTRUCTIONS—Submit an original and four (4) copies of this Petition to the NLRB Regional office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

Purpose of this Petition (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

(Check one)

☒ RC-CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one) ☐ Is/are not previously certified.
☐ Is/are previously certified in Case No. _____

☐ AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____
Attach statement describing the specific amendment sought.

1. NAME OF EMPLOYER	2. EMPLOYER REPRESENTATIVE TO CONTACT	3. PHONE NO.
Robbins Tire and Rubber Company	Deke Wann	383-5461

4. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code)
Two Plants - 6th St., Muscle Shoals, Al. & 6th St., Tuscumbia, Al.

5. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.) | 6. IDENTITY OF PRINCIPAL PRODUCT OR SERVICE
Factory | Rubber Products

7. Unit involved (In UC petition describe PRESENT bargaining unit and attach description of proposed clarification.)

Included

All production and Maintenance employees including lead-persons and cafeteria workers.

Excluded

Office Clerical, Guards, Professional Employees, as defined in the Act.

(If you have checked box RC in 1 above, check and complete EITHER item 8a or 8b, whichever is applicable)

8a. ☐ Request for recognition as Bargaining Representative was made on _____ (Month, day, year) and Employer declined recognition on or about _____ (Month, day, year) (If no reply received, so state)

8b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

9a. Recognized or Certified Bargaining Agent (If none, so state)

NAME	AFFILIATION
NONE	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

6a. NUMBER OF EMPLOYEES IN UNIT: Present: approx. 500 | Proposed (by UC/AC): _____

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT? ☒ YES ☐ NO
*Not applicable in RM, UC, and AC

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Month, day, and year)

10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES _____ NO X

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ (Insert name) A LABOR ORGANIZATION, OF _____ (Insert address) SINCE _____ (Month, day, year)

12. LIST ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c) WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)
None known to us			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Aluminum Workers International Union, AFL-CIO
(Petitioner and affiliation, if any)

By W. B. Ruttledge
(Signature and title or office of person filing petition)

Regional Director
(Title, if any)

Address P. O. Box 99, Russellville, Al. 35653
(Street and number, city, State, and ZIP Code)

205 332-4677
(Telephone number)

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

EXHIBIT A

GPO 861-598

BEST COPY AVAILABLE

EXHIBIT B

[11]

[February 11, 1976]

* * * * *

REPORT ON CHALLENGED BALLOTS AND OBJECTIONS

The petition in the above-entitled proceeding was filed on August 7, 1975. Pursuant to a Stipulation for Certification Upon Consent Election approved August 29, 1975, an election by secret ballot was conducted on October 9, 1975, among the employees in the appropriate unit to determine the question concerning representation.[1] Upon conclusion of the balloting the parties were furnished a tally of ballots which showed that of approximately 537 eligible voters, 244 cast valid votes for and 248 cast valid votes against the Petitioner. There were 2 void ballots and 10 challenged ballots. The challenged ballots are sufficient in number to affect the results of the election. On October 16, 1975, the Petitioner filed timely objections to the election and a copy thereof was timely served on the Employer.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the challenged ballots and objections has been conducted and the undersigned, having considered the results thereof, makes the following findings and recommendations to the Board:

---

[1] The appropriate unit is: "All production and maintenance employees, including truck drivers and shipping, receiving and inventory clerks and all other plant clerical employees, employed by the Employer at its Plant Numbers 1 and 2 located, respectively, in Muscle Shoals City, Alabama and Tuscumbia, Alabama, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

THE CHALLENGED BALLOTS

Thelma M. Borden, Martin G. McKay, Robert W. McCorkle, D. H. Kimbrough, and *James Trousdale* were challenged by the Petitioner on the ground that they are supervisors. No evidence was presented by the Petitioner to show that any of these above-named employees possess any of the indicia of supervisory authority as defined in Section 2(11) of the Act and the Employer denied that they are supervisors. Therefore, the undersigned finds them to be eligible voters.

J. D. Colburn was challenged by the Board agent because his name did not appear on the eligibility list for the payroll period ending August 24, 1975. According to the Employer's personnel records, Colburn was terminated on September 8, 1975. Inasmuch as Colburn was not employed on the date of the election, the undersigned finds that he is not an eligible voter.

Larry W. Kirby was challenged by the Board agent because his name was not on the eligibility list. Personnel records on Kirby show that he was hired on August 28, 1975. The eligibility date for the election was August 24, 1975, and, inasmuch as Kirby was not employed on that date, he is not an eligible voter.

James M. Johnson was challenged by the Board agent because his name did not appear on the voting list at the polling place at which he appeared to vote (there were two polling places). However, his name does appear on the voting list at the other location and was not stricken from that list, indicating he did not vote there. The payroll records indicate that Johnson was hired on June 4, 1974, and was working on the day of the election as a driver. Therefore, the undersigned finds that Johnson is an eligible voter.

Ronald Vernon was challenged by the Board agent because his name was not on the eligibility list. According to Vernon, and corroborated by Employer records, he was hired May 24, 1973, and worked continuously

until he went on military leave in May 1975. Inasmuch as Vernon was continuously employed by the Employer, being on a military leave of absence, and had returned to work and was working on the day of the election, the undersigned finds him to be an eligible voter.

The Petitioner objected to the Board agent's ruling on a ballot during the count of the ballots on the ground that the identity of the voter is revealed by certain fingerprints or thumbprints that appear as smudges on the ballot. In the opinion of the undersigned, such inadvertent marks left by a workers' soiled hands do not reveal the voter's identity. Therefore, since the secrecy of the ballot is not disturbed and the voter's intent is clearly shown, the undersigned finds this to be a valid ballot.

OBJECTIONS

By letter dated November 11, 1975, the Petitioner requested withdrawal of its Objections number 2, 3, 4, 5 and 6. Such request is hereby granted.

OBJECTION 1:

> The Employer, through its representatives, made threats to take away their Bonus and other Benefits if the Employees voted for the Union.

The Petitioner presented two employees as witnesses with respect to this objection. One witness stated that on or about October 8, 1975, the supervisor in the cove base department, James Cooley, told this employee that the Employer would take away the employees' Christmas bonus if the Union came in. According to this witness, no one else was present when this conversation took place.

Cooley denied that he told any employee that he thought the Employer would take away the Christmas bonus if the Union came in. Since there were, admittedly, no witnesses to this alleged conversation, a credibility issue exists.

[14]

Another employee witness testified that on or about October 7, 1975, Personnel Manager Billy Irons, during a conversation which took place in the cove base department, stated the Company would never do anything else for that employee if he voted against the Company. This statement is completely denied by Irons. Thus, both of the above incidents present credibility issues which may best be resolved by record testimony in a hearing.

Several employee witnesses stated that during two meetings held prior to the election, one about a month prior to and the other within a week of the election, the Employer's Executive Vice-President Poncet Davis, Jr., spoke to them and told the employees that any negotiations with the Union on wages could begin with the minimum wage and that the employees could lose their Christmas bonus through negotiations. Davis also allegedly told the employees, in reference to a strike at the Employer's plants which occurred in the early 1960's, that, if the Union came in it would happen again and it was possible the plant would not reopen this time. All of the witnesses were in agreement that Davis read his speeches from prepared texts.

While complete copies of Davis' two speeches were not presented by the Employer, the portions of those speeches applicable to the above allegations were presented through the sworn statement of Personnel Manager Wilmer E. Maddox who was present when both speeches were given and who had copies of both speeches with him and followed along as Davis spoke.

According to Maddox, there was nothing said during the first speech, which was given during meetings on September 10, 1975, with reference to wage negotiations beginning with the minimum wage. Davis did refer to a strike at Robbins in the early 1960's which involved this same Union and made the following statements:

[15]

> There was a 7½ week strike mainly because the Company would not grant a check-off. Consider

> what can happen to a company's business when there is a strike. Look at Union Aluminum (UALCO) in Sheffield. After a devastating strike it never reopened. All of its business had gone to competitors, and there was no business to go home to. If we have a strike which shuts down the plant for any period of time, our customers may go elsewhere to get tubes and cove. Then if we come back after a strike and say to our customers, "We are back, give us an order." Most of them may say, "We are happy you are back, but we have a new supplier. If you want our business again, give us a price discount, to get back in." Then we give a price discount, and say we start up again. What does that do to company profits and wage increases. The company profit is crippled, and where does the money come for wage increases?
>
> Go down to Sheffield at Raleigh & 3rd Street, and drive around the empty Union Aluminum plant which once worked many hundreds of people. This same Aluminum Workers Union got in there and said they would help. Did the union help? Every employee lost his job. What happened—a 19-month strike. The company went out of business. Who got hurt? Who got hurt—the employees and their families, that's who got hurt. All lost their jobs. I hope that doesn't happen here at Robbins.

The only statement made by Davis about losing the Christman bonus was "All employees lost in negotiations their Christmas bonus for that year and never got it back."

Davis' second speech was given on October 7, 1975. Davis said the following with respect to negotiations beginning with the minimum wage:

> The Company and the Union don't have to start negotiations from where you are now. You should know before you vote, negotiations can start from the minimum wage and no benefits. Even from where our wages and benefits are now, negotiations can go up or go down.

With respect to the subject of the Christmas bonus Davis said:

> You know the Union in negotiations lost the employees their Christmas bonus that year. The Company will not take away the Christmas bonus because the Union might be voted in. However, if this Union is voted in here, your Christmas bonus is going to be up for negotiation. When this same Union got in here before, the Christmas bonus was up for negotiation. Your Christmas bonus was not paid after negotiations with this same Union.

[16]

> I'd ask the Union what happened last time they got in and promised a lot and actually lost the employees' paychecks for 7½ weeks and their Christmas bonus in negotiations.

Davis made the following statements with respect to strikes:

> I have asked our auditors to give me a report on how a strike could affect the company. They tell me a long strike would mean limited production by supervisors and others that would work. We would have two choices. The company might be able to continue limited production, and try to get other companies to stamp the Robbins or Western or Flexco brand on our products for us, and ship direct to our customers for us. Or we might have to liquidate, and the family put what's left into other investments, since to start up again, giving price discounts which I told you about would be terrible. The UALCO plant in Sheffield had to liquidate, and never started up again because of the Aluminum Workers' strike. Finally, I'd ask the union pushers two last questions. How much money they will give you to live on during a long strike, and for how long. Secondly, ask if this very same union has actually broken other companies Robbins' size, like UALCO. Then I'd ask one of the union guys to actually drive me around

> the dead UALCO plant at Raleigh and 2nd in Sheffield, and explain "WHAT HAPPENED." What happened here, to all the fancy union promises, of how the union could make the company do anything.

There have been no allegations made nor evidence presented by the Petitioner that the factual situations referred to in Davis' speeches, such as to the strikes at Robbins and at UALCO during the early 1960's are misrepresentations. In the opinion of the undersigned, the statements made by Davis do not constitute threats of job loss or benefit loss, but are subject to voter evaluation and within the realm of permissible campaign propaganda, and, thus not objectionable.

OBJECTION 7:

Removing Union Buttons from employees' clothing. One employee alleged that about two weeks prior to the election, packing department Supervisor Donald Pennington grabbed a union button off this employee's shirt pocket and put it in his own pocket. Three or four other employees, whose identity this witness could not recall, were standing in close vicinity when this incident took place.

[17]

According to the Employer, Pennington is no longer employed by the Employer and, thus, was not available for a response.

Another employee alleged that about three to four weeks prior to the election, lap splicing department Supervisor Tom Ellett removed a union button from that employee's shirt while two other employees were present. Ellett admitted that, perhaps three weeks prior to the election, he had a conversation with an employee in the lap splicing department about the Union and that this was only one of many such voluntary discussions between Ellett and that employee concerning the subject. At one point during the conversation the employee pointed to a union button he had on his shirt pocket and said that he was not going to vote for the Union but was

merely wearing the button to keep the other employees from bothering him. The employee pointed to the button again and said that Ellett could have it if he wanted it. Thus, Ellett reached over, unclasped the button (perhaps with the assistance of the employee), and removed the button. Ellett stated that this was the only time he took a button from any employee and that he had not asked for the button in this instance. Ellett couldn't recall if anyone else was around when this took place.

An employee on the 7 a.m. to 3 p.m. shift alleged that a few days prior to the election, as he was leaving the plant at the end of his shift, he was stopped by evening shift Supervisor William Daniel. Daniel pointed to a pen clasp that the employee had on his shirt pocket which had a Union insignia upon it and asked why the employee was advertising the Union. The employee replied that it was a good pen holder. Daniel then pulled the holder out of the employee's shirt pocket, turned it around so the insignia wouldn't show, and replaced it, saying as he did so that he would get the employee a better one. Danied admitted that one day prior to the

election as he was coming in at the start of his shift, he passed a friend of his. According to Daniel, the employee pulled his jacket open to reveal his shirt pocket and told Daniel to see what a good pencil holder he had. Daniel looked at the pen holder with the Union insignia on it and replied that it was a good one but he, Daniel, could get him a better one. Daniel stated that this was all that was said and denied that he touched the pen holder at all.

In the opinion of the undersigned, the above incidents described by the employee witnesses, and the denials thereof by the supervisors, raise credibility issues which may be best resolved by record testimony at a hearing.

OBJECTION 8:

Making threats to discharge employees for engaging in Union activities.

One employee witness alleged that on or about October 8, 1975, Personnel Manager Billy Irons asked him, while out in the plant, how he was going to vote. When the employee replied that he hadn't decided, Irons allegedly replied that he was disappointed in this employee and thought that perhaps he (Irons) had made a mistake in hiring him. Irons denied that he asked any employee how he was going to vote or that he told any employee, in connection with a discussion of the Union, that he, Irons, felt he had made a mistake in hiring him.

Another witness, who does not work for Robbins but who is the brother of an employee, stated that about a month prior to the election, Supervisor Buck Collins stopped by this witness' home and asked if there were any job openings where this individual worked. When this witness asked who needed a job, Collins allegedly replied that this witness' brother (the Robbins employee) might. When asked if that was because of the Union, Collins allegedly replied that it was. Collins, on the other hand, stated that he stopped at a local gas station one day prior to the election and saw an employee's

brother there who asked Collins if he had any jumper cables. Collins replied that he did not, but the station owner overheard and replied that he had some. The three of them then walked over to this person's car and attempted to get it started. At some point, Collins was asked how the Union was coming along at Robbins to which Collins replied that it looked good. According to Collins, that was all that was said about the Union and he denied asking about any job openings or inferring that the Robbins' employee might need a job because of the Union.

Another employee alleged that Supervisor Collins warned him about a week prior to the election that he would be "run off" if he didn't quit pushing the Union. The employee's wife and grandmother also alleged that Collins called them at their home prior to the election, warning them that this employee would lose his job

if he didn't leave the Union alone. Collins denied that any such incidents took place.

Such credibility issues as raised by the above objection may best be resolved by record testimony at a hearing.

OBJECTION 9:

> A representative of management engaged in electioneering within a plain sight of the entrance way to the voting area, while the employees were going to vote.

Several employees alleged that they viewed certain management officials, namely Wilmer Maddox and Billy Irons, standing inside an entrance way some 15 to 20 feet from the entrance to the cafeteria at Plant No. 1 where the polling place was located. However, none of these witnesses recalled anything being said to them by either Maddox or Irons other than a casual greeting. Both Maddox and Irons admit that they were in the plant area in question during the time the polls were open but that they were only there to insure that certain equipment in that building which needed close attention was

[20]

not left unattended and to be sure that all employees were given an opportunity to go vote. Both deny that they said anything to any rank-and-file employees while the polls were open. Absent any evidence of interference on the part of these Employer officials, the undersigned finds Objection 9 to be without merit.

OBJECTION 10:

> Promising to give certain employees an extra bonus if they voted against Union representation.

Four employees presented by the Petitioner alleged that various supervisors, including cove base department Supervisor Leonard McCormick, tread rubber department Supervisor Sam Styles, and lap splicing department Supervisor James Borden, told them the Employer intended to give the employees a three-week Christmas bonus instead of the usual two-week bonus if the Union didn't come in. All three supervisors denied that they told any employees they would receive an extra Christmas bonus if the Union was not voted in. Another employee witness stated that on two separate occasions within a week and a half of the election he asked production belt Supervisor Roger Crittenden if the employees would receive an extra Christmas bonus and Crittenden allegedly said that they might possibly get an extra bonus but he couldn't say for sure, that the last time the Union came in the employees did not get any bonus. While Crittenden admitted that several employees asked him, prior to the election, about the possibility of an extra Christmas bonus, he denied that he said they might possibly get an extra bonus. According to Crittenden, he told any employee who asked that he knew nothing about an extra Christmas bonus. The foregoing allegations and denials thereof raise credibility issues which may best be resolved by record testimony in a hearing.

OBJECTION 11:

> Other conduct not specifically alleged but adduced by the investigation.

[21]

One employee alleged that on the evening of October 8-9, prior to the opening of the polls, Vice-President of Production Deek Wann came over to him and asked him why he was for the Union and what had the Union ever done for him. (According to this witness, another employee had stuck a union sticker on his back.) Wann allegedly stated that the Employer had done a lot for the employee by hiring him and training him and that he should be a good employee and vote against the Union. This employee replied that he would make up his mind when he went to vote. Wann admitted that he talked to numerous employees on the evening prior to the opening

of the polls, but could not recall seeing any employee with a union sticker on his back and denied making any statements as alleged.

Another employee alleged that he and a relative of his who is also employed at Robbins approached mill room Supervisor Tommy Dickens about two weeks prior to the election and asked Dickens to serve as a reference for a relative of theirs who was seeking employment at Robbins. According to both witnesses, Dickens asked them if the prospective employee was a union man or not. Dickens admitted that he is frequently asked by Robbins' employees to serve as a reference for a friend or relative who is seeking employment there. However, Dickens could not recall anyone asking him during the month prior to the election and pointed out that Robbins was not even hiring at that time. Dickens also denied that he ever asked any employee whether a prospective employee was pro-union or not.

One of the above employee witnesses also alleged that on the same day as above he went to see Superintendent Harry Meadows and also asked Meadows to serve as a reference for his relative who was applying for a job. According to this witness, Meadows asked if the applicant was a union man and stated that the Employer didn't need any more troublemakers in the plant. Meaddows could not recall any

employee asking him to serve as a reference during the time immediately preceding the election and also pointed out that the Employer was not hiring at that time. He specifically denied that he ever asked any employee is a job applicant was for the Union or that he stated, in reference to the Union, that the Employer didn't need any more troublemakers.

These above alleged incidents raise credibility issues which may best be resolved by record testimony at a hearing.

FINDINGS AND RECOMMENDATIONS

For the reasons stated above, the undersigned finds *J. D. Colburn* and *Larry W. Kirby* to be ineligible voters and recommends to the Board that the challenges to their ballots be sustained and that *Thelma M. Borden, Martin G. McKay, Robert W. McCorkle, D. H. Kimbrough, James Trousdale, James M. Johnson* and *Ronald Vernon* are eligible voters and the ballot challenged by the Petitioner as revealing the identity of the voter is a valid ballot and recommends to the Board that those challenges be overruled, the ballots be opened and counted and, upon the basis of which, a Revised Tally of Ballots issue. If said Revised Tally of Ballots shows the Petitioner to have received a majority of the valid votes counted, it is recommended that a Certification of Representative issue. Should the revised tally show the Petitioner not having received a majority of the valid votes counted, it is recommended that Petitioner's Objection 9 be overruled and that a hearing be ordered to resolve the issues raised by the Petitioner's Objections 1, 7, 8, 10, and 11.[2]

Dated at Atlanta, Georgia, this 11th day of February 1976.

/s/ Walter C. Phillips
Walter C. Phillips,
Regional Director
National Labor Relations Board
730 Peachtree Street, N.E.,
Room 701
Atlanta, Georgia 30308

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[2] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by February 24, 1976.

EXHIBIT C

[23]

[April 6, 1976]

* * * *

DECISION AND DIRECTION

Pursuant to authority granted it under Section (b) of the National Labor Relations Act, as amended, a three-member panel has considered determinative challenges and objections in an election held October 9, 1975,[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations.

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for Region 10 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Direction, open and count the smudged ballot and the ballots of Thelma M. Borden, Martin G. McKay, Robert W. McCorkle, D. H. Kimbrough, James Trousdale, James M. Johnson and Ronald Vernon and, thereafter, prepare and cause to be served upon the parties a revised tally of ballots, including therein the count of said ballots. In the event that the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's objections will be moot, and the Regional Director shall issue the appropriate certification of representative.

IT IS FURTHER DIRECTED that in the event the revised tally of ballots shows that the Petitioner has not received a majority of the ballots cast, a hearing be held before a Hearing Officer, to be designated by the Regional Director for

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 244 for, and 248 against, the Petitioner; there were 10 challenged ballots.

[24]

The purposes of taking evidence with respect to the issues raised by Objections 1, 7, 8, 10 and 11.

IT IS FURTHER DIRECTED that the Hearing Officer designated for the purpose of conducting such a hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 10 days from the issuance of such report either party may file with the Board in Washington, D.C., an original and 7 copies of the exceptance thereto. Immediately upon the filing of such exceptions the parties filing the same shall serve a copy on the other party and file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER DIRECTED that the above entitled matter be, and it hereby is, referred to the said Regional Director for the aforementioned purpose, including the purpose of conducting a hearing if necessary, and the Regional Director be, and hereby is, authorized to issue Notice thereof.

Dated, Washington, D.C. April 6, 1976.

John H. Fanning, Member

John A. Penello, Member

Peter D. Walther, Member
National Labor Relations Board

[SEAL]

(25)

Form Approved
Budget Bureau No. 44-R001.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CA-11763

Date Filed 3-4-76

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Robbins Tire and Rubber Company

b. Number of Workers Employed: 500

c. Address of Establishment (Street and number, city, State, and ZIP code): Sixth Street, Tuscumbia, Al bama 35674

d. Employer Representative to Contact: Duke Wann

e. Phone No.: 383-5441

f. Type of Establishment (Factory, mine, wholesale, etc.): Factory

g. Identify Principal Product or Service: Inner tubes

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (If this subsection) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about December 11, 1975, the Employer, in order to discourage membership in a labor organization, discriminated in regard to the hire and tenure of employment and to the terms and conditions of employment of its employee, Gene E. Newton.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Gene E. Newton

4a. Address (Street and number, city, State, and ZIP code): 1401 Courtview Towers, 201 No. Pine St., Florence, Ala. 35630

4b. Telephone No.: 766-6487

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: [signature] (Signature of representative or person filing charge) — An Individual (Title, if any)

Address: 1401 Courtview Towers, 201 No. Pine Street, Florence, Ala. 35630 — 766-6487 (Telephone number) — 2-26-76 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 887-573

EXHIBIT D

(26)

Form Approved
Budget Bureau No. 44-R001.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMENDED

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CA-11763

Date Filed 3-3-76

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Robbins Tire and Rubber Company

b. Number of Workers Employed: 500

c. Address of Establishment (Street and number, city, State, and ZIP code): Sixth Street, Tuscumbia, Alabama 35674

d. Employer Representative to Contact: Duke Wann

e. Phone No.: 383-5441

f. Type of Establishment (Factory, mine, wholesale, etc.): Factory

g. Identify Principal Product or Service: Inner tubes

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and _____ (If this subsection) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about August 7, 1975, and thereafter, the Employer has committed acts and conduct which interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Gene E. Newton

4a. Address (Street and number, city, State, and ZIP code): 1401 Courtview Towers, 201 No. Pine Street, Florence, Ala 35630

4b. Telephone No.: 766-6487

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: [signature] (Signature of representative or person filing charge) — An Individual (Title, if any)

Address: 1401 Courtview Towers, 201 N. Pine St., Florence, Ala. 766-6487 (Telephone number) — 2-26-76 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 887-573

EXHIBIT E

BEST COPY AVAILABLE

EXHIBIT F

[27]

[dated March 26, 1976]

• • • • •

COMPLAINT AND NOTICE OF HEARING

It having been charged by Gene E. Newton, an individual, that Robbins Tire and Rubber Company, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

Copies of the charge and amended charge, filed on February 4, 1976, and March 3, 1976, respectively, were served upon Respondent by registered mail on February 4, 1976, and March 3, 1976, respectively.

2.

Respondent is, and has been at all times material herein, an Alabama corporation with an office and places of business located at Muscle Shoals City, Alabama, and Tuscumbia, Alabama, where it is engaged in the manufacture of rubber products.

3.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped finished products valued in excess of $50,000

directly to customers located outside the State of Alabama.

[28]

4.

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

Aluminum Workers International Union, AFL-CIO (herein called the Union), is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

The following-named individuals, occupying the positions set opposite their respective names, are, and have been at all times material herein, agents of Respondent and supervisors within the meaning of Section 2(11) of the Act:

James J. Borden	—	First Shift Foreman in Plant #1
James J. Cooley	—	Third Shift Cove Base Dept. Supervisor
Hollis Collins	—	First Shift Curing Tube Dept. Supervisor
Robert Edward Crittenden	—	Third Shift Production Belt Supervisor
William G. Daniel	—	Second Shift Supervisor in Plant #1
Tommy Dickens	—	Second Shift Mill Room Supervisor
Thomas Ellett	—	Second Shift Lap Splicing Dept. Supervisor
Billy Ray Irons	—	Assistant Personnel Manager

Leonard McCormick	—	Second Shift Cove Base Dept. Supervisor
Harry Meadows	—	Superintendent of the Mill Room, Cove Base Dept. and Receiving Dept.
Michael Palmer	—	Lap Splice Department Supervisor
Donald Pennington	—	Packing Department Supervisor
Sam Styles	—	First Shift Cold Tread Rubber Department Supervisor
Donald Tyne	—	Supervisor
Deek Wann	—	Vice President of Production

[29]

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, interrogated its employees concerning their union membership, activities and desires, and the union membership, activities and desires of other employees:

Lap Splice Dept. Supervisor Michael Palmer	—	August 19, 1975, and September 18, 1975
Supervisor Donald Tyne	—	August 20, 1975
Curing Tube Dept. Supervisor Hollis Collins	—	September 2, 1975
Packing Department Supervisor Donald Pennington	—	September 16, 1975
Lap Splice Dept. Supervisor Thomas Ellet	—	October 2, 1975
Second Shift Supervisor in Plant #1 William G. Daniel	—	October 7, 1975

8.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective

names, in and about the vicinity of its Plant #2, interrogated its employees concerning their union membership, activities and desires and the union membership, activities and desires of other employees.

Cove Base Dept. Supervisor James J. Cooley	—	September 22, 1975 September 29, 1975
Superintendent Harry Meadows	—	September 25, 1975 October 2, 1975
Mill Room Supervisor Tommy Dickens	—	September 25, 1975
Vice President Deek Wann	—	October 8, 1975
Assistant Personnel Manager Billy Ray Irons	—	October 8, 1975

[30]

9.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, promised its employees an increased Christmas bonus if the employees rejected the Union as their collective bargaining agent:

Plant #1 Foreman James J. Borden	—	September 25, 1975
Cold Tread Rubber Department Supervisor Sam Styles	—	September 25, 1975 September 29, 1975

10.

Respondent, by its supervisor and agent, Cove Base Department Supervisor Leonard McCormick, on or about October 2, 1975, in and about the vicinity of its Plant #2, promised its employees a larger Christmas bonus if the employees rejected the Union as their collective bargaining agent.

11.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #2, threatened its employees that the plant would close if the Union were successful in its organizational campaign:

Lap Splice Dept. Supervisor Thomas Ellett	—	September 25, 1975
Vice President Deek Wann	—	October 3, 1975

12.

Respondent, by its supervisor and agent, Assistant Personnel Manager Billy Ray Irons, on or about October 7, 1975, in and about the vicinity of its Plant #2, threatened its employees with reprisal by telling its employees if they voted for the Union, the Employer would never do anything else for them.

13.

Respondent, by its supervisor and agent, Curing Tube Department Supervisor Hollis Collins, on or about September 2, 1975, in and about the

[31]

vicinity of its Plant #1; on or about September 9, 1975, in and about the vicinity of an employee's home in Russellville, Alabama; and on or about October 2, 1975, in and about the vicinity of its Plant #1 and in telephone conversations, threatened its employees with discharge if they engaged in activities on behalf of the Union.

14.

Respondent, by its supervisor and agent, Vice President Deek Wann, on or about September 25, 1975, in and about the vicinity of its Plant #1, threatened its employees that it would be futile for the employees to engage in activities on behalf of the Union by stating that the Union could not make Respondent do anything it did not want to do.

15.

Respondent, by its supervisor and agent, Lap Splice Department Supervisor Thomas Ellett, on or about October 2, 1975, and October 6, 1975, in and about the vicinity of its Plant #1, threatened its employees that it would be futile for the Union to represent the employees since the Respondent would not negotiate with the Union nor give the Union what it wanted.

16.

Respondent, by its supervisor and agent, Superintendent Harry Meadows, on or about September 25, 1975, in and about the vicinity of its Plant #2, threatened its employees that it would not hire individuals who supported the Union.

17.

Respondent, by its supervisor and agent, Vice President Deek Wann, on or about October 3, 1975, in and about the vicinity of its Plant #1, threatened its employees that it would not employ individuals who supported the Union.

[32]

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, threatened its employees with the loss of their Christmas bonus if the Union were selected as their collective bargaining agent:

Lap Splice Department Supervisor Michael Palmer	—	August 19, 1975
Supervisor Donald Tyne	—	August 20, 1975
Cold Tread Rubber Department Supervisor Sam Styles	—	September 25, 1975
Lap Splice Department Supervisor Thomas Ellett	—	September 29, 1975
Production Belt Supervisor Roger Crittenden	—	September 30, 1975
Vice President Deek Wann	—	October 3, 1975

19.

Respondent, by its supervisor and agent, Cove Base Department Supervisor James J. Cooley, on or about October 8, 1975, in and about the vicinity of its Plant #2, threatened its employees with the loss of bonuses if the Union were selected as their collective bargaining agent.

20.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, physically removed union insignia being worn by its employees:

Lap Splice Department Supervisor Michael Palmer	—	September 18, 1975
Lap Splice Department Supervisor Thomas Ellett	—	September 18, 1975
Packing Department Supervisor Donald Pennington	—	September 25, 1975

21.

Respondent, by its supervisor and agent, Lap Splice Department Supervisor Michael Palmer, on or about October 10, 1975, in and about

[33]

the vicinity of its Plant #1, prohibited its employees from talking about the Union at any time.

22.

The acts of Respondent alleged in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 27th day of April, 1976, at 10:00 a.m., Central Daylight Time, and consecutive days thereafter until concluded, in the Colbert County Courthouse, Tuscumbia, Alabama, a hearing will

be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings held before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Atlanta, Georgia, this 26th day of March, 1976.

Gilbert Cohen, Acting Regional Director
National Labor Relations Board
730 Peachtree Street, N.E., Room 701
Atlanta, Georgia 30308

EXHIBIT G

[34]

* * * * *

ANSWER

COMES NOW Robbins Tire and Rubber Company, Respondent here, and files pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, this its Answer to the March 26, 1976 Complaint of the Acting Regional Director. In support hereof, Respondent answers as follows:

1.

Paragraphs 1, 2, 3, 4, 5, 6, of the Complaint are admitted.

2.

Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 of the Complaint are denied.

WHEREFORE having fully answered this 31st day of March, 1976, Respondent respectfully moves the Complaint be dismissed in its entirety.

Respectfully submitted,

Robbins Tire and Rubber Company

By: _____
WILLIAM M. EARNEST,
Of Counsel

ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

EXHIBIT H

[35]

CERTIFICATE OF SERVICE

[36]

LETTERHEAD

[March 31, 1976]

HAND DELIVERED

Mr. Gilbert Cohen,
Acting Regional Director
National Labor Relations Board
Region 10
730 Peachtree Street, N.E.
Suite 701
Atlanta, Georgia 30308

Re: Robbins Tire and Rubber Company
Cases Nos. 10-CA-11762 and 10-RC-10410

. . . . . .

Request for Records Under The Provisions
Of The Freedom Of Information Act

Dear Mr. Cohen:

The Answer to the March 26, 1976 Complaint and Notice of Hearing has been filed this date with your office. We are also in receipt of your office's February 11, 1976 Report on Challenged Ballots and Objections which recommends that a hearing be conducted to resolve credibility issues. The alleged incidents set forth in the Report on Challenged Ballots and Objections are co-extensive with portions of the allegations of the Complaint.

Pursuant to the requirements of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), and the Rules

and Regulations of the National Labor Relations Board, as amended, 29 C.F.R. § 102.117(c)(1), it is hereby requested that copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which

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the Board will call to testify at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s). The hearing in Case No. 10-CA-11762 is scheduled to begin on April 27, 1976.

Please be advised, pursuant to 29 C.F.R. § 102.117(c)(2)(iv)(b), that the undersigned agrees to assume full financial liability for all charges which may be incurred in responding to this request.

As this request has been hand delivered this date and the hearing date is only a matter of weeks away, we ask that you respond as soon as possible, in accordance with the requirements of the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i), and the Board's Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(i).

Very truly yours,

WILLIAM M. EARNEST
Of Counsel to
Robbins Tire and Rubber Company

WME:mp

EXHIBIT I

[38]

[April 2, 1976]

LETTERHEAD

William M. Earnest, Attorney
Elarbee, Clark & Paul
750 Coastal States Building
Atlanta, Georgia 30303

Dear Mr. Earnest:

Your letter dated March 31, 1976, requesting certain information under the Freedom of Information Act, 5 U.S.C. Sec. 552, *et seq.*, was received by this office on March 31, 1976.

Your request for "all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the hearing(s) in the above-referenced cases . . ." must be denied. Such records are privileged from disclosure by Exemptions 5 and 7(A), (C) and (D) of Section 552(b) of the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. Section 552(b)5, 7(A), 7(C) and 7(D). Exemption 5 of the FOIA exempts disclosure of the information you seek. That exemption incorporates the privileges which the Government enjoys under the relevant statutory and case law in the discovery context. *Renegotiation Board* v. *Gruman Aircraft Corp.*, 421 U.S. 168, 184 (1975). Those privileges include the "executive privilege" for predecisional memoranda which reflect the Agency's deliberative process, and the "attorney work product privilege." See *N.L.R.B.* v. *Sears, Roebuck and Co.*, 421 U.S. 132, 150-154 (1975). When an investigator takes an affidavit or statement in an unfair labor practice investigation, it is done in anticipation of trial and must be viewed as attorney work product, which is not normally discoverable. *Hickman* v. *Taylor*, 329 U.S. 495, 512-513 (1947). Moreover, even if the results of the investigation do not warrant a finding that an unfair labor practice has been committed, the affidavits would still be

used by the Regional Director in the administrative deliberations leading to the determination of whether or not issuance of a complaint is warranted. See *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (C.A. 8, 1975).

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Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the investigation of charges, much information, including statements and affidavits, is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the FOIA. In the administration of the Act, the agency must be able to obtain in its investigations all potentially relevant information. The protection of the identity of individuals and the substance of the information they submit in the agency's investigation is an important means of assuring the agency's continuing ability to obtain such relevant information. Individuals giving statements in the investigation are given express assurance that their statements will not be disclosed unless and until the individual is called as a witness in a formal proceeding, as provided for in Section 102.118(b) of the Board's Rules and Regulations. If the agency were forced to disclose statements submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation of individuals, hinder obtaining information from all potential sources and, consequently, substantially interfere with enforcement proceedings. Cf. *N.L.R.B.* v. *Scrivener*, 405 U.S. 117.

The requested statements are also within Exemption 7(D) because their disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the agency during the investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this agency. Accordingly, since the individuals furnishing statements in the instant cases are confidential sources, Exemption 7(D) authorizes our refusal to identify the individuals.

Also, since these statements contain matter personal to the individuals who supplied them and to individuals referred to in the statements,

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they are exempt from disclosure under Exemption 7(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interest of privacy against the interest of a requesting party in disclosure. You have submitted no consideration which would, I find, overcome the privacy rights of individuals and therefore, their right of privacy must prevail.

For the reasons set forth above, your request for the statements must be denied. See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, (D.C.P.R.); *Clement Brothers Company* v. *N.L.R.B.*, 282 F. Supp. 540, (D.C. Ga.); affmd. *N.L.R.B.* v. *Clement Brothers Co.*, 407 F.2d 1027 (C.A. 5). See also, *Wellman Industries, Inc.* v. *N.L.R.B.*, 490 F.2d 427 (C.A. 4), cert. den., 95 S. Ct. 61, (Oct. 15, 1974).

Further, deletion of names from these records would not preserve the interest recognized by Exemptions 7(A), (C) and (D) since disclosure of the material contained therein would, itself, constitute invasion of personal privacy, reveal confidential sources, and consequently, interfere with enforcement proceedings under the considerations set forth above. Deletion of portions sufficient to prevent an unwarranted invasion of personal privacy or prevent disclosure of a confidential source would result in a record

so fragmented as to be incoherent and not responsive to your request.

The undersigned is responsible for the determination that the records you have requested are privileged from disclosure under the Freedom of Information Act. You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's Rules and Regulations by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely yours,

GILBERT COHEN
Acting Regional Director

EXHIBIT J

[41]

April 8, 1976

CERTIFIED MAIL NO. 945987
AIR MAIL/SPECIAL DELIVERY

The Honorable John S. Irving
General Counsel
National Labor Relation Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Robbins Tire and Rubber Company
Case Nos. 10-CA-11762 and 10-RC-10410

.....

Appeal from Denial of Request For Records Under The Provisions of The Freedom of Information Act

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Dear Sir:

Pursuant to 29 C.F.R. § 107.117(c)(2)(ii) of the Board's Rules and Regulations, as amended, the undersigned hereby appeals from the denial by the Acting Regional Director for Region 10, dated April 2, 1976, of the undersigned's request for inspection and copying of documents. Copies of the request and denial are annexed hereto.

The basis for this appeal is that the Acting Regional Director has erroneously relied on the permissive exemptions of 5 U.S.C. § 552(b)(5) and (7)(A)(C) and (D) to deny disclosure of the items specified in our request. None of the materials sought falls within those narrow statutory exemptions. Furthermore, the Acting Regional Director has failed to specifically identify the documents in question, describe their contents, and demonstrate why, as to each item denied, a

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specific exemption applies. It is the Government's burden to prove that a specific document falls within one or more exemption. This burden has not been met. It is not met by a broad assertion that a general type of document automatically qualifies for exemptions under one or more of the provisions of § 552(b).

The Acting Regional Director has failed to show why sanitized copies or portions of documents cannot be made available so as to comply with the Freedom of Information Act disclosure requirements, while protecting any asserted interest in confidentiality. He merely asserts that providing a portion of the statements requested "would result in a record so fragmented as to be incoherent and not responsive to your request." It is not for the Acting Regional Director to determine that portions of records which he admits are disclosable should not be made available because they would be, in his opinion, fragmented or incoherent. It is his burden to provide these portions.

In addition the request for inspection and copying of documents related *only* to written statements of those witnesses which the Board will call to testify at the April 27 hearing and were requested to be produced at least seven (7) days before the hearing. There is no breach of confidentiality as the witness will testify at the hearing and the written statements must also be produced then upon proper request. There is no interference with the Board's investigatory processes as complaint has already issued and the investigation has been concluded.

To the extent that you may believe that any of these documents are within the exemptions of 5 U.S.C. § 552 (b), we request that you nevertheless waive the exemptions pursuant to 29 U.S.C. § 102.118, to assure that our client, Robbins Tire and Rubber Company, is not deprived of its rights before the Agency in NLRB Cases Nos. 10-CA-11762 and 10-RC-10410.

Please be advised that we continue to agree to assume full financial liability for the direct cost of document search and duplication in compliance with the Freedom

of Information Act, and as required by 29 C.F.R. § 102.-177(c)(2)(iv)(B).

[43]

Thank you for your prompt attention to this matter.

Very truly yours,

WILLIAM M. EARNEST
Of Counsel to
Robbins Tire and Rubber Company

WME:mp

Enclosures

cc: Mr. Gilbert Cohen
Acting Regional Director
National Labor Relations Board
Region 10
Suite 701, 730 Peachtree Street, N.E.
Atlanta, Georgia 30308

bcc: Mr. Poncet Davis, Jr.
Mr. Wilmer E. Maddox

[44]

[filed April 15, 1976]

* * * * *

APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW the Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, acting by and through its attorneys, and, pursuant to Rule 65 of the Federal Rules of Civil Procedure applies to this Court for a temporary restraining order enjoining the Defendant herein from holding any hearing in connection with NLRB Case Nos. 10-RC-10410 and 10-CA-11762 except in accordance with the Order of this Court. In support hereof, Plaintiff respectfully shows:

1. Plaintiff has requested under the provisions of the Freedom of Information Act, as amended, 5 U.S.C. § 552 (a), and under the Rules and Regulations of the National Labor Relations Board, as amended, 29 C.F.R. § 102.117 (c) (1) "copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)."

2. The Defendant has improperly rejected Plaintiff's request.

[45]

3. Plaintiff is entitled to the requested information. See supporting Memorandum Brief.

4. The hearing for which the above information is sought is presently scheduled for April 27, 1976. If the Defendant does not produce the requested information a reasonable time prior to the April 27, 1976 hearing then Plaintiff will be wrongfully precluded from preparing its defense in the hearing and irreparably injured. Plaintiff's action will be moot if Defendant is allowed to proceed with the hearing without producing the requested information.

5. The prejudice which would result to Plaintiff if the hearing proceeded without the production of the requested information far outweighs any effect on Defendant caused by a rescheduling of the hearing until such time as this Court rules on the merits of this action.

WHEREFORE, Plaintiff requests this Court to issue a Temporary Restraining Order and in due course a Preliminary Injunction pending the determination of this action.

Respectfully submitted,

POELLNITZ, COX, ROBISON, McBURNEY & JONES

By: /s/ Poellnitz
ELARBEE, CLARK & PAUL

By: /s/ William M. Earnest
Attorneys for Plaintiff
ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

POELLNITZ, COX, ROBISON, McBURNEY & JONES
P.O. Box 876
Florence, Alabama 35630
(202) 764-0821

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[filed April 15, 1976]

* * * * *

AFFIDAVIT

I, William M. Earnest, being counsel of record for Plaintiff in the action of ROBBINS TIRE AND RUBBER COMPANY against the NATIONAL LABOR RELATIONS BOARD states as follows:

On Friday, April 9, 1976, at 5:20 p.m. EST, I telephoned Ms. Abigail Cooley, Defendant NLRB's Assistant General Counsel for Special Litigation and advised her I represented Robbins Tire and Rubber Company. I further advised her we had in connection with the forthcoming hearing on April 27, 1976 requested copies of statements of those persons who were to be witnesses at the hearing and that such statements be produced at least seven (7) days prior to the start of the hearing. I informed Ms. Cooley our request had been denied by the Region and that we had appealed to NLRB General Counsel Irving but had no response yet. I told her it was our intention to file a Complaint in the District Court to obtain such information and wondered, because of the closeness of the hearing, if it would be necessary to seek a restraining order with regard to the hearing or if the NLRB would reschedule the hearing until a determination of the merits could be made by the Court. She said the NLRB would not agree to a rescheduled hearing. I told her that I would then consult with my client but that we would be filing a Complaint next week. I told her I would notify both her office and the local NLRB Regional Office of the filing of the Complaint. She said she would not be coming down to handle the matter but would get someone out of the local (Atlanta, Georgia) Regional Office.

At 3:01 P.M. EST, Monday, April 12, 1976, I telephoned Acting Regional Director Gilbert Cohen and advised him that we were going to file a Complaint in the United States District Court for the Northern District of

Alabama seeking the statements requested in my letter to him. He acknowledged his receipt and familiarity with my letter. I told him because of the closeness of the April 27, 1976 hearing we would be seeking a restraining order as to the holding of the hearing. I told him of the above call to Ms. Cooley and that I would call NLRB General Counsel Irving. I advised him of the 10:30 A.M. hearing on April 15, 1976 in this Court.

I then called at 3:24 P.M. EST NLRB General Counsel John Irving's office and was referred to attorney Bill Wachter who said he would be filling Ms. Cooley's position effective Monday, April 19, 1976. I told Mr. Wachter of my appeal to General Counsel Irving and read to him the request. I asked him if it still was the General Counsel's policy to deny such requests and he said that it was. I then told him that a Complaint on behalf of Robbins Tire and Rubber Company would be filed in the United States District Court seeking this information and that because of the nearness of the April 27, 1976 hearing we would also be seeking a restraining order.

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I told him a hearing would be held at 10:30 A.M. CST in the District Court in Birmingham regarding the above.

I have read the above affidavit and swear it is true to the best of my knowledge and belief.

/s/ William M. Earnest
WILLIAM M. EARNEST
Of Counsel to Plaintiff,
Robbins Tire and
Rubber Company

Subscribed and sworn to before me
this 12th day of April, 1976
/s/ Jimmie S. Love
Notary Public

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[filed April 15, 1976]

* * * * *

MOTION TO DISMISS COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The National Labor Relations Board, defendant herein, moves to dismiss the complaint and request for injunctive relief in the above-captioned case under Rule 12(b), Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the action;
2. The complaint and request for injunctive relief fail to state a claim upon which relief can be granted.

Alternatively, defendant moves that summary judgment be granted under Rules 12(c) and 56, Federal Rules of Civil Procedure, on the basis of the complaint and exhibits attached thereto.

WHEREFORE, defendant prays that the complaint and request for injunctive relief be dismissed, or, in the alternative, that summary judgment be entered in their favor.

Respectfully submitted,

By /s/ William E. Caldwell
WILLIAM E. CALDWELL
Acting Regional Attorney
National Labor Relations Board
Region 10
730 Peachtree Street, N.E.,
Room 701
Atlanta, Georgia 30308
Telephone: (404) 526-5361

Dated at Atlanta, Georgia
this 15th day of April, 1976.

---

[49]

[filed April 15, 1976]

* * * *

OPPOSITION TO COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 51 (1938), the Supreme Court determined that district courts have no authority to interfere with the Board or its agents during the course of an unfair labor practice proceedings. See also, *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler, et al.*, 303 U.S. 54 (1938). A major premise of this holding rested on the doctrine requiring the exhaustion of administrative remedies. Those remedies include utilization of the statutory review procedures available upon entry of the agency's final decision and order as the exclusive forum for challenging interlocutory rulings on both substantive and procedural matters. See, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47 (1936). It is now well established that the statutory review procedures set forth in Section 10(e) and (f) of the National Labor Relations Act are the exclusive procedures for assertions, such as those made here, of deprivation of constitutional and statutory rights. See, e.g., *Sears, Roebuck & Co.* v. *N.L.R.B.*, 433 F.2d 210, 211 (C.A. 6, 1970); *McClains Industries, Inc.* v. *N.L.R.B.*, 521 F.2d 596 (C.A. 6, 1974); *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 677 (C.A. 5, 1966); *United Aircraft Corp.* v. *McCulloch*, 365 F.2d 960, 961 (C.A.D.C., 1960), cert. denied, 380 U.S. 910. This review is

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also the exclusive procedure for assertions of prejudice in preparing a defense because of refusal of the Board to permit discovery, including assertions that such refusal constitutes an improper withholding of records under the Administrative Procedure Act. See, e.g., *Vapor Blast Mfg. Co.* v. *Madden*, 280 F.2d 205, 209 (C.A. 7, 1960), cert. denied, 364 U.S. 910; *Sears, Roebuck & Co.* v.

N.L.R.B., *supra*; *McClain Industries, Inc.* v. *N.L.R.B.*, *supra*; *Polymers, Inc.* v. *N.L.R.B.*, 414 F.2d 999, 1005-1006 (C.A. 2, 1969), cert. denied, 396 U.S. 1010; *Intertype Co.* v. *Penello*, 269 F. Supp. 573, 576 (D.C.N.D. Va. 1967). For instance, in *Vapor Blast Mfg. Co.* v. *Madden*, *supra*, a case very similar to the instant one, the employer subject to unfair labor practice proceedings before the Board requested the district court to issue an order enjoining Board hearings and a declaratory judgment declaring the Company's right to inspect employee affidavits obtained by Board agents during the course of their investigation. The Court refused to grant the relief requested stating, inter alia (280 F.2d at 208, 209):

> The review provisions of the Act, 29 U.S.C.A. Sec. 160(e) and (f), provide adequate and full opportunity for the Company to raise the contentions it tendered in its complaint in the district court. Under the provisions of Section 10(e) of the Act, in an enforcement proceeding the Company may put in issue the question of whether it was deprived of its rights to procedural process by the Board's action to suppressing the documents in question.
>
> . . . [M]erely raising a constitutional issue in its complaint for declaratory judgment, when full appellate review of the administrative proceedings is available and in the absence of any extenuating circumstances, is insufficient to give the district court jurisdiction over the subject matter in the fact of the well-established doctrine of exhaustion of administrative remedies . . .

Accordingly, it is clear that this court has no authority to enjoin the Board's proceedings herein, or to review the actions of the General Counsel or his agents during the course of those proceedings.

[51]

The Freedom of Information Act (5 U.S.C. Sec. 552, *et seq.*, as amended, 88 Stat. 1563 (1974) does not alter

this long settled rule. Plaintiff has not exhausted its administrative remedies before the Board. By letter dated April 8, 1976, Plaintiff appealed to the General Counsel the Acting Regional Director's refusal to furnish the documents requested. The Act provides that the General Counsel make a determination with respect to any appeal within twenty working days after the receipt of such appeal. The General Counsel has not yet ruled on Plaintiff's appeal. Thus, Plaintiff's complaint herein is premature and fails to state a claim upon which relief can be granted under the judicial review provisions of the Freedom of Information Act. See *Satra Belarus, Inc.* v. *N.L.R.B.*, —— F. Supp. ——, 91 LRRM 2555 (D.C.E.D. Wisc. 2/18/76).[1]

Whether the General Counsel will grant or deny Plaintiff's appeal is unknown and Counsel herein does not intend to imply what that decision will be. However, in *Title Guarantee Co.* v. *N.L.R.B.*, —— F.2d —— (C.A. 2, 4/12/76) the Court, holding that statements of witnesses were exempt from disclosure under Exemption 7(A) of the Freedom of Information Act, stated:

> . . . We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a backdoor amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. 14] It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended . . .
>
> . . . In light of the delicate relationship which exists between employer and employee, we think that

[1] This Court on October 17, 1975 dismsised a complaint in *Federal Mogul*, Civil No. CA75H1945J, filed by a respondent in a Board proceeding under identical circumstances.

> Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for
>
> [52]
>
> discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. In short, while we have been impressed with the appellee's grasp of the FOIA amendment and almost persuaded by its argumentation and that of the district court, we are forced to conclude that statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A) . . .

As Senator Hart, the sponsor of the recent amendments to the Information Act, pointed out, Exemption 7 of that Act, as originally enacted and as amended, was intended "to prevent harm to the government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. S9329 (daily ed., May 30, 1974). In *Sears, Roebuck & Co.* v. *N.L.R.B.*, 473 F.2d 91 (C.A.D.C., 1972), cert. denied, 415 U.S. 950, the Court of Appeals for the District of Columbia summarily reversed an order of the district court, Corcoran, J.) enjoining the Board from processing an unfair labor practice proceeding pending compliance with the Information Act. In so doing, the Court stated, in language clearly applicable here (473 F.2d at 93):

> . . . While *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 1A LRRM 575 (1938), cannot be taken as mandating that such intervention is never warranted, it still has vitality as indicating that it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing

> of irreparable harm is an indispensable condition of such intervention.
>
> Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention. E.g., *Myers*, *supra*, at 51-52.
>
> In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration . . .
>
> [53]
>
> It may be that Sears will be held entitled to the documents under the Information Act, and it may be that is possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order.

After the Supreme Court denied the Company's petition for writ of certiorari in this case, it had occasion to consider the merits of Sears' claims under the Freedom of Information Act, and observed:

> . . . Sears appeal—without benefit of the documents sought—was ultimately successful, a complaint was filed with the Board, and hearings were scheduled to commence on the complaint on November 9, 1971.

> Proceedings before the Board were delayed for a time by a stay issued by the District Court, later reversed by the Court of Appeals, *Sears, Roebuck & Co.* v. *N.L.R.B.*, 153 U.S. App. D.C. 380, 473 F.2d 91 (1973), cert. denied, 415 U.S. 950 (1974) . . .
>
> Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. *E.P.A.* v. *Mink*, 410 U.S. 73, 79, 92 (1973); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

N.L.R.B. v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975).

Thereafter, in a case virtually identical to the instant one, the United States District Court for the District of Columbia denied plaintiff company's request for a mandatory injunction compelling the production of statements in sufficient time prior to hearing to permit their use by the company defendant in an unfair labor practice proceeding, observing that plaintiff had "failed to establish that it [would] suffer irreparable injury absent the issuance of such an injunction,

[54]

as required by *N.L.R.B.* v. *Sears, Roebuck & Co.* . . ." *General Cigar Co., Inc.* v. *Nash*, —— F. Supp. ——, 89 LRRM 2863 (D.C.D.C., 1975).

And finally, the Supreme Court held in *Renegotiation Board* v. *Bannercraft Clothing Co., Inc., et al.*, 415 U.S. 1 (1974) that the court below erred in enjoining proceedings before the Renegotiation Board pending resolution of plaintiff's request for production of documents under the Freedom of Information Act. The reasons for so holding were as follows: (1) prior to the enactment of the Information Act, the Supreme Court had consistently held that such proceedings were not to be enjoined prior to the

exhaustion of the administrative process (415 U.S. at 20-22); (2) "[s]eeking injunctive relief during the pendency of such proceedings encourages delay through resort to preliminary litigation over an FOIA claim" (415 U.S. at 23); (3) the decision of the administrative agency does not impose any obligation on the parties until termination of further court proceedings, and thus the injury suffered, absent an injunction, is simply that of being unsuccessful in the initial administrative stages and the litigation expense, which does not constitute irreparable injury (415 U.S. at 23-24);[9] and (4) "Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery, see *Sears, Roebuck & Co.* v. *N.L.R.B.*, 433 F.2d 210, 211 (C.A. 6, 1970), over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings . . . Discovery for litigation purposes is not an expressly indicated purpose of the Act." (415 U.S. at 24). We submit that all of the above criteria are equally

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applicable in Labor Board proceedings. Thus, as shown above, the courts, including the Supreme Court, have always held that Board unfair labor practice proceedings should not be enjoined prior to the exhaustion of the administrative process. Seeking injunctive relief during Labor Board proceedings encourages delay just as much as it does in Renegotiation Board proceedings. Plaintiff has an adequate judicial remedy under the Act, and will at most suffer litigation expense in pursuing it, which

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[9] As the Court stated (*ibid*):

> "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52; Jaffe, Judicial Control of Administrative Action, 429 (1965). Without a clear showing of irreparable injury, see *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 104 U.S. App. D.C. 106, 111, 259 F.2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process. *Myers, supra, Sears, Roebuck & Co.* v. *N.L.R.B.*, —— U.S. App. D.C. ——, ——, 473 F.2d 91, 93 (1973) [cert. denied, 415 U.S. 950]."

expense does not warrant injunctive relief. And finally, interference with the Board's proceedings would permit plaintiff to use the Information Act as a tool of discovery over and beyond that provided in the Board's court sanctioned rules. Thus, it is evident that *Bannercraft* is controlling here, and that plaintiff is not entitled to injunctive relief pending litigation of its Information Act claim. See, *Title Gurantee Co., supra; Sears, Roebuck & Co.* v. *N.L.R.B., supra; General Cigar Co., Inc.* v. *Nash, supra.*

CONCLUSION

For all the foregoing reasons, the Board respectfully submits that its motion to dismiss complaint and request for injunctive relief, or, in the alternative, for summary judgment, should be granted.

Respectfully submitted,

JOHN S. IRVING, General Counsel,
ELLIOTT MOORE, Deputy Associate
General Counsel,
ABIGAIL COOLEY, Assistant General
Counsel for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
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Telephone: (202) 254-9221

By /s/ William E. Caldwell
WILLIAM E. CALDWELL, Acting
Regional Attorney, Region 10
National Labor Relations Board
730 Peachtree Street, N.E. Room 701
Atlanta, Georgia 30308
Telephone: (404) 526-5361

Dated at Atlanta, Georgia
this 15th day of April, 1976.

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[56]

Thursday April 15th 1976

JUDGMENT ON DECISION BY THE COURT CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE NORTHWESTERN DIVISION
OF THE NORTHERN DISTRICT OF ALABAMA

Civil Action File No. CA-76-H-528-NW

ROBBINS TIRE AND RUBBER COMPANY

vs.

NATIONAL LABOR RELATIONS BOARD

JUDGMENT

This action came on for (hearing) on April 15, 1976, before the Court, Honorable James H. Hancock, United States District Judge, presiding, and the issues having been duly (heard)

It is Ordered and Adjudged that this matter is taken under advisement.

JAMES E. VANDEGRIFT, Clerk

By: /s/ Lester H. Jones
Deputy Clerk

FILED:

April 15, 1976
James E. Vandegrift, Clerk

By: /s Lester H. Jones
Deputy Clerk
Birmingham, Alabama
John Weaver, reporting
Time: 10:30-11:45

[57]

[filed April 16, 1976]

* * * * *

MEMORANDUM OF DECISION

This cause came on for hearing on April 15, 1976, on the request by plaintiff for a preliminary injunction and on the motion by defendant to dismiss, or, in the alternative, for summary judgment. Since all parties agreed that the issues presented are legal, not factual, the court entered an oral order under Rule 65 of the Federal Rules of Civil Procedure directing that the trial of this action on the merits be advanced and consolidated with the hearing on April 15, 1976, on the application for a preliminary injunction.

The following is a brief summary of the facts which are not in dispute. In connection with its investigation of a contested election and its investigation of an unfair labor practice charge, defendant secured certain affidavits and/or written statements of various individuals. On March 26, 1976, the Board set down for hearing on April 27, 1976, the complaint predicated upon the unfair labor practice charge. April 27, 1976 is also the date of the hearing concerning issues raised by the election contest.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), and defendant's rules and regulations, 29 C.F.R. § 102.117(c)(1), plaintiff on March 31, 1976, in writing requested of the Board's Acting Regional Director:

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> "that copies of all written statements, signed or unsigned, contained in the Board's case files *with respect to those witnesses which the Board will call to testify* at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)." (Emphasis added)

Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request.

By letter dated April 2, 1976, the Acting Regional Director of the Board denied plaintiff's request, asserting that the statements which were requested were privileged from disclosure by exemptions 5 and 7(A), (C) and (D) of § 552(b) of Title 5 of the United States Code. On April 8, 1976, plaintiff appealed the determination to the Board's General Counsel who has not ruled on such appeal and who is not required so to do prior to the scheduled hearing on April 27, 1976. Thereafter the complaint was filed herein which invoked this court's jurisdiction under 5 U.S.C. § 552(a)(4)(B).

Normally a court will require the exhaustion of administrative remedies prior to entertaining jurisdiction of an action complaining of agency action. But this exhaustion principle is not without its exceptions and exhaustion rests within the sound discretion of the court. See *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F.2d 860 (5th Cir. 1975). Here plaintiff has promptly taken all steps available to it to pursue its administrative review, and the court finds that the factors normally to be considered in an exception to the exhaustion principle are in plaintiff's favor here. See *McKart* v. *United States*, 395 U.S. 185 (1969). Thus, for the reasons stated by the court into the record during the oral hearing on April 15, 1976, this court is of the opinion that jurisdiction has been properly invoked under the Freedom of Information Act without plaintiff being required further to exhaust its administrative review. The

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facts in this case are different than those in *Federal-Mogul Corporation* v. *National Labor Relations Board*, CA75-H-1945-J, decided by this court on October 17, 1975. In *Federal-Mogul* plaintiff sought to invoke this court's jurisdiction under somewhat similar circumstances, but plaintiff there had not appealed the decision of the Board's Regional Director to the Board's General Counsel either prior to initiating the action or prior to the hearing on

the requested preliminary injunctive relief. Here plaintiff has promptly done all within its power to secure final agency action.

In its complaint plaintiff essentially seeks two types of relief. First, plaintiff seeks the information it requested of defendant on March 31, 1976, and secondly, plaintiff seeks an injunction against the scheduled April 27, 1976 hearing. With regard to this second request, the court is aware of the reluctance of district courts to enjoin proceedings before the National Labor Relations Board except in those rare and well defined instances where the Board may be engaged in acts which are either contrary to specific prohibitions of the National Labor Relations Act or which are in excess of its delegated powers. Neither situation is presented by the instant case, and while a violation of the Freedom of Information Act may be another exception to the general rule, enjoining proceedings before the Board is not appropriate where other, more normal relief will be sufficient. The court is of the opinion that plaintiff may be adequately protected by required production of information to which it may be entitled under the Freedom of Information Act without the assistance of an injunction directed at the April 27, 1976 hearing, and thus plaintiff will suffer no irreparable injury by the hearing.

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It is important to note that the Board does not claim that there is something unusual about the affidavits or statements or that their is something within them that would cause them to be anything other than an average statement obtained during a routine investigation. The Board's attorney stated during the oral hearing on April 15, 1976, that, for the purposes of deciding this case, the court could assume that the Board's position is predicated simply upon the fact that the statements were obtained in connection with a pending matter. Thus, an *in camera* inspection of the statements will not be necessary.

There is no dispute that plaintiff is entitled to the information it has requested unless defendant can discharge the burden it has of establishing that the information

falls within one of the specific exemptions contained in the Act. Even prior to the 1974 Amendment to the Freedom of Information Act, the Fifth Circuit Court of Appeals had established that the disclosure of material in government files was the rule, not the exception, and that the Act was intended to increase public access to records except under specific, narrowly constructed exemptions. *Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir. 1973). Certainly no less can be said for the Freedom of Information Act following the 1974 Amendment.

The first exemption defendant seeks to assert is the one established by 5 U.S.C. § 552(b)(5) for inter-agency or intra-agency memorandums or letters. The Board does not argue that the statements and affidavits are in the form of "memorandums" or "letters." See *Bellingham Frozen Foods* v. *Henderson*, 91 LRRM 2761 (W.D. Wash. 1976). Neither does the Board urge that the statements and affidavits possess a deliberative, as opposed to factual quality. See *Title Guraantee*

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Company v. *N.L.R.B.*, 90 LRRM 2849 (S.D.N.Y. 1975) [rev'd on other grounds, —— F.2d —— (2nd Cir. 1976)]. And this court is of the opinion that normal, routine affidavits and statements taken from persons not employed by the Board during a typical investigation by the Board are not embraced in the § 552(b)(5) exemption. See *Stokes* v. *Brennan, supra.*

As noted earlier, counsel for the Board acknowledged during the April 15, 1976 hearing that there is nothing unusual about or contained in the affidavits and statements which it declines to supply. Thus in urging an exemption under § 552(b)(7)(C) or § 552(b)(7)(D), the Board must be able to support a position that any statement or affidavit which it holds in connection with an open file is embraced within one of such exemptions. This it cannot do. The Board does not discharge the burden cast upon it in claiming one of such two exemptions simply by showing that the writing sought is in affidavit or statement form taken from a person who will

testify at a forthcoming hearing. See *Bellingham Frozen Foods* v. *Henderson, supra.* This is particularly true where, as here, the only statements or affidavits sought are from persons who will be called to testify at the April 27, 1976 hearing and under the Board's own rules, affidavits and statements of any witness must be supplied immediately after the witness has testified. 29 C.F.R. § 102.117(b)(1).

The final matter to be considered is the one exemption the Board asserts most strongly and the one, if any, to which it may be entitled. 5 U.S.C. § 552(b)(7)(A). Defendant relies primarily upon the recent decision of the Second Circuit Court of Appeals in *Title Guarantee Company* v. *N.L.R.B.*, —— F.2d —— (2nd Cir. 1976). There, Title Guarantee Company had requested copies of *all*

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written statements contained in the Board's file and any such statements subsequently available to the Board. Satisfying the burden of demonstrating that this broad request interferes with the Board's enforcement proceedings (where none of the persons who gave the statements might be called as witnesses and thus where none of the statements might ultimately be supplied to the Company under the Board's own rules) is substantially easier than satisfying the burden the Board bears in the instant case where the *fact* of disclosure of the statements is not the issue but simply the *time* at which the disclosure will be made. The request here is limited only to those statements of persons who will testify and thus the Board will be required by its own rules immediately after the testimony is given to deliver the statements here in issue to plaintiff. 29 C.F.R. § 102.118(b)(1). And the Board has not demonstrated how the delivery to plaintiff several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceedings of the Board where, in connection with those proceedings, the Board by its own rules will be required to give the statements and affidavits to plaintiff. The court is therefore of the opinion that the defendant should be required to supply the information requested in writing by the

March 31, 1976 letter. An appropriate order will be entered.

DONE this 16th day of April, 1976

/s/ James H. Hancock
United States District Judge

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[63]

[filed April 16, 1976]

* * * * *

ORDER

In accordance with the Memorandum of Decision this day entered, it is hereby ORDERED, ADJUDGED, DECREED and DECLARED that the information sought by plaintiff, i.e., written statements now or hereafter contained in the Board's case filed with respect to those witnesses which the Board will call to testify at any hearing in Cases Nos. 10-CA-11762 and 10-RC-10410, constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), with respect to which plaintiff is entitled to inspection and copying.

It is further ORDERED that the Board shall turn over to the plaintiff copies of the material sought by plaintiff in its letter of March 31, 1976, for inspection and copying on or before April 22, 1976, or, at the election of the Board, on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness.

It is further ORDERED that costs are taxed against defendants.

DONE this 16th day of April, 1976.

/s/ James H. Hancock
United States District Judge

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[64]

[filed April 22, 1976]

* * * * *

NOTICE OF APPEAL

TO: William M. Earnest
Ellerby, Clark, and Paul
750 Coastal States Building
Atlanta, Georgia 30303

Defendants appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered on April 16, 1976 in the above-captioned case, directing the defendant to turn over to plaintiff, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended 88 Stat. 1563, *et seq.*, witness statements secured in the investigation of Board Case No. 10-CA-11762, 10-RC-10410, a consolidated unfair labor practice and representation proceedings.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

[65]

By /s/ William Wachter
WILLIAM WACHTER, Acting Assistant
General Counsel for Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Dated at Washington, D.C.
this 20th day of April, 1976

Co-Counsel: Aileen A. Armstrong
(Ext. 9001)

—and—

GILBERT COHEN, Regional Attorney
Region 10, N.L.R.B.
Peachtree Building, Suite 701
730 Peachtree Street, N.E.
Atlanta, Georgia

[66]

[Certificate of Service]

[Tr. 1]

TRANSCRIPT OF PROCEEDINGS
COURT OF APPEALS

* * * * *

Northern District of Alabama
May 14, 1976

* * * * *

[Tr. 2]

APPEARANCES

FOR THE PLAINTIFF:

Mr. C. A. Poellnitz
Poellnitz, Cox, Robison, McBurney
& Jones
P. O. Box 876
Florence, Alabama 35630
Mr. William M. Earnest
Elarbee, Clark & Paul
750 Coastal States Building
Atlanta, Georgia 30303

FOR THE DEFENDANT:

Mr. William E. Caldwell,
Acting Regional Attorney
National Labor Relations Board
Region 10
730 Peachtree Street, N.E.
Room 701
Atlanta, Georgia 30308

[Tr. 3]

PROCEEDINGS

April 15, 1976 10:30 A.M.

THE COURT: The matter we shall take up at this time is the case of Robbins Tire and Rubber Company versus National Labor Relations Board, CA 76-H-528-NW. Sometime early this week, I believe it was on Monday, April the 12th, Mr. Charles Poellnitz, attorney in Florence, telephoned my office and indicated that he had a complaint that he wanted to file that he felt entitled him to some immediate relief and that he wanted a setting time to consider the matter, although the complaint had not actually been filed at that point in time, and I told him that we would be in a position to take it up Thursday, April the 16th, at 10:30, and he should, of course, so advise the NLRB counsel.

This morning there was filed in the court in addition to the complaint an affidavit reflecting that notification, the affidavit being of Mr. William N. Earnest, attorney in Atlanta. I assume, Mr. Poellnitz, that a copy has been served on the NLRB.

MR. POELLNITZ: Yes, sir.

THE COURT: I think for the record it may be good first if you would introduce Mr. Earnest.

MR. POELLNITZ: I will, Your Honor.

[Tr. 4]

THE COURT: And then if the NLRB would introduce himself for the record so that we can have those names on the record.

MR. POELLNITZ: Your Honor, this is William Earnest who is a member of the District Court Bar of the Northern District of Georgia and a member of the firm of Elarbee, Clark & Paul of Atlanta, and is actually a specialist in labor matters and is telling me what to say in this case.

THE COURT: Fine. Glad to have you here.

MR. CALDWELL: If Your Honor please, appearing for the Government, William E. Caldwell, Acting Re-

gional Attorney in Atlanta. I'm admitted for the Eastern District Court in Tennessee, and if Your Honor please, I did receive the copy of the complaint and application from counsel about ten minutes ago.

THE COURT: I received it an hour ago, so we're nearly even.

MR. CALDWELL: If Your Honor please, I also filed about five minutes ago a motion to dismiss or in the alternative for summary judgment and the supporting memorandum. I trust it's in reasonable response since I did not know the contents fully of the application.

[Tr. 5]

THE COURT: The complaint or the copy of it that I have received does not show that it has been verified.

MR. POELLNITZ: Your Honor, the reason for this is I had the original in Florence and got here about 10:00 this morning and brought the verification with me.

THE COURT: All right. There's a verification, then, that has been filed verifying the facts.

MR. POELLNITZ: Yes, sir.

THE COURT: I see.

MR. POELLNITZ: I had that done in Florence and had the paper with me and didn't feel like entrusting them to the mails.

THE COURT: Mr. Caldwell, while I review the motion to dismiss and the accompanying brief that you filed, I'm going to ask you, if you would, to review carefully the complaint since you have not had a long time to look at it either and to point out to me what factual allegations in there that you think might be in dispute. Most of them appear to be more or less routine-type factual-type allegations, but if you would, be prepared to indicate what factual allegations in there might be in dispute.

MR. CALDWELL: Yes, Your Honor.

[Tr. 6]

THE COURT: Thank you, Your Honor.

(Short pause)

THE COURT: Did you find any difficult factual disputes with the basic facts set forth in there?

MR. CALDWELL: No, Your Honor. There is one very minor item on page 3, item 10. It refers to a hearing being set on the objections. That document has not in fact actually issued yet. It's my understanding that it is being issued and consolidated, so I have no objection.

THE COURT: For all practical purposes, on April 27, 1976, then, there's going to be a hearing both with regard to the charges that were filed and also with regard to the election itself.

MR. CALDWELL: Yes, Your Honor, that is correct.

THE COURT: Let me ask you a question with regard to one of the cases that you've cited in here, and I've not read the Renegotiation Board, First Banacraft case. Was that decided before the '74 amendment to the Freedom of Information Act? Was it dealing with the old Act or the new Act?

MR. CALDWELL: I believe, Your Honor, it was the old Act. It was decided February 19, 1974.

THE COURT: It has to be the old Act, then.

[Tr. 7]

MR. CALDWELL: And that was the old Act.

THE COURT: The new Act didn't come in until November of '74.

MR. CALDWELL: That's right, the latter part of '74.

THE COURT: And the Sears, Roebuck case necessarily was.

MR. CALDWELL: Yes, Your Honor, it was, too.

THE COURT: Mr. Poellnitz, do you or Mr. Earnest have anything by way of evidence you want to offer?

MR. POELLNITZ: No, Your Honor. The facts as I understand it are really not disputed.

THE COURT: Mr. Caldwell, does the Board have anything by way of evidence that they desire to offer?

MR. CALDWELL: No, Your Honor.

THE COURT: So, it's just strictly a matter of argument and application of legal principles.

MR. CALDWELL: As I understand it, Yes, Your Honor.

THE COURT: Well, let's just chat it out for a minute. How about that? I fully agree with the first two pages of your brief.

MR. CALDWELL: Thank you.

[Tr. 8]

THE COURT: That's not saying I deny the rest of it. I'll just address myself to the first two at this point in time. I think that there is a reluctance of the District Courts, and necessarily so and for various reasons, to interfere with the ongoing proceedings of the NLRB and, more specifically, to enjoin any scheduled proceeding before the NLRB. The only exceptions, I think, perhaps to that would be where the NLRB is violating its own rules or exceeding specific delegations of authority. I don't think that either of those principles are present here. It doesn't appear to be.

So, it would certainly appear that, for the moment at least, this Court would have to hold that it doesn't have any way to enjoin those proceedings as such. I do think, however, that the Court can take jurisdiction under the Freedom of Information Act here where there has been no delay on the action of the company to pursue its rights under Freedom of Information.

As soon as the hearings were scheduled, they promptly said we want the affidavits and statements of people who will testify. As soon as that request was denied, they promptly filed an appeal. I recognize that the appeal period has not expired at this point in

[Tr. 9]

time and that customarily, in fact, almost uniformly Courts cannot and should not accept jurisdiction to review agency action while the proceedings are still in progress, until there's been an exhaustion, but there are exceptions to that and those exceptions may very well exist here. Yes, sir.

MR. EARNEST: I might point out that in the affidavit that I have, I have contacted the General Counsel's office in Washington and was advised by phone that their policy had not changed in denying such appeals as stated in my affidavit.

THE COURT: I think the amount of litigation that is apparently developing suggests this, too.

MR. EARNEST: And it was not our intention to—we did intend if at all possible to wait until we had received a letter, but the timing of that letter was not within our hands and the letter may well have come back after the hearing began.

THE COURT: The Federal Mogul case that you cited in a footnote in your brief was a different situation than here presented because there the Federal Mogul had not even filed an appeal to the General Counsel prior to coming into court, asserting while we have still got time to appeal that they—in that case factually, they had asked for the

[Tr. 10]

information, had been denied at the Regional level, came straight to court five days later or something like that, and when we had the hearing ten days later, I said have you appealed to the General Counsel. No, we haven't. Our time hasn't expired yet. They had not even sought relief through the administrative remedy at the time they were asking the Court to intervene.

Here these people have in fact actually sought and done everything they can to exhaust. They've set it in motion. So the question is simply whether there's a sufficient justification to make an exception to the general rule that you don't take jurisdiction during the administrative process. They've done everything that they can and promptly so to at least initiate the administrative process, whereas in Federal Mogul they had not. They had taken Step One, had an adverse decision, didn't even take Step Two, and came straight here and actually when we had the hearing, had not even taken Step Two.

So, there's a distinction, I think. It really seems to me that while I can't and don't intend to enjoin the NLRB

proceeding, I don't think that I should, I don't think that the plaintiff really could show irreparable injury even if we could

[Tr. 11]

find some perhaps violation of a rule that would give me a right to enjoin. So, I don't really think that I should.

I do think, however, that this Court does have jurisdiction under Freedom of Information after exhaustion of administrative procedures. I think that that jurisdiction is not absolutely predicated on exhaustion where circumstances suggest that exhaustion can be waived. Here we have the plaintiff facing the prospects of a hearing on the 27th having made what I feel and conclude is a proper request at least for information. They've described it properly, they've done it timely, the information is definitive. It's not an "open your whole bag" approach. It's just give us the statements or affidavits of people you expect to call. They limited it in that fashion.

It seems to be generally covered, and they certainly but for your asserting the specific offenses, the specific exceptions or exemptions that the Board has, on the surface they are entitled to what they've asked for and they've done it timely. So, then, we come to a point of the exemptions and whether they are valid exemptions to the information, keeping in mind, as I indicated to you, asking you

[Tr. 12]

if that Supreme Court decision was under the old Act or new Act. If that decision were under the new Act, I think we would fold up the proceedings and go home.

I think that fully covers the proceedings and you would be entitled to win. I don't think that the Supreme Court will hold that under the new Act. The new Act is a hole new ballgame, it seems to me. Certainly the District Court in Washington correcently concluded that the Exemption Five is not present. Yes, sir.

MR. CALDWELL: May I, Your Honor, at this point—

THE COURT: Y'all both interrupt at any time. I'm just sharing with you some thoughts.

MR. CALDWELL: I was listening without interrupting. If I may go back, there are a couple of points. I'm not, with all due respect, sure that I agree with Your Honor that the Federal Mogul—it was a distinction without a difference perhaps, because I see it as the same whether they had exhausted or not exhausted in that you are saying that the time that a hearing it set expedites or moves and changes the Federal Information Rules of appealing and so forth because, of course, we expedited our response

[Tr. 13]

at the Regional level two days after the answer and as quickly as we could even though we had a longer period of time in which to respond, and I think whether we had responded before this Court or they had not appealed before this Court or they had appealed before this Court doesn't in fact make a difference as to the legal issue under the Freedom of Information Act.

THE COURT: No. The point there was simply to say that they had here done everything they could toward exhaustion, whereas in Federal Mogul they had not.

MR. CALDWELL: To that extent I would agree, but as a legal result I don't think there's a great deal of difference. Now, I think, Your Honor, I'm in accord that the Freedom of Information Act did not change the authority of jurisdiction of a District Court to enjoin Board proceedings at this stage before a hearing. I think, Your Honor, that—I recognize that District Courts around the country have varied widely in their interpretation of their jurisdiction under the Freedom of Information Act to require production or not require production of affidavits, some Courts holding that the Board was required to, others that the Board was not required to, and it is a very difficult area which is in a great state

[Tr. 14]

of flux at the present time. There's no appellate court, no Supreme Court decision certainly on it since the amendments.

There's only one appellate court decision, as I understand it, reviewing the lower courts and determining whether statements were exempt under Section 7 A of the Act, and that is the Title Guarantee decision which issued just the other day in the Second Circuit. I have a copy of that decision if Your Honor would like.

But that goes on the merits of whether statements taken by the Board in an Unfair Labor Practice proceeding are available, and I think, Your Honor, that the Freedom of Information Act creates a right in the public for certain information from the Government, and the fact that the party requesting that information is a private litigant or not with the Government doesn't increase his rights nor decrease his rights under the Public Information Act and I think he's to be treated as a member of the public without regard to his status of dispute with the Government as to whether he's entitled to that information under the Freedom of Information Act.

So, the fact that the party here is coming up for an Unfair Labor Practice with us doesn't

[Tr. 15]

entitle him to more or less consideration than someone who comes in that says I'm entitled to that information under the Act.

THE COURT: It doesn't entitle him to any more information or any more rights under it, but may very well justify a capsuled timetable and expedited proceeding or, in certain instances, perhaps a shortcutting of final exhaustion to get into Federal Court to assert rights that otherwise could be asserted by a private individual.

MR. CALDWELL: Which gives the Court jurisdiction.

THE COURT: Purely and simply jurisdiction—

MR. CALDWELL: Yes, sir, Your Honor, jurisdiction, and under the Act, of course, jurisdiction to enjoin the Board from not producing the statements if they find that they're entitled to them. To that extent we are in agreement. I would only suggest that the Court of Appeals decision in the Title Guarantee interpreting exemption under Section 7 is at this point dispositive of the issue. I hope that we're going to have some other Court of Appeals decisions issued in the very near future which will adopt that similar approach to this exemption and Board statements. I have a copy, Your Honor, of the Second

[Tr. 16]

Circuit's decision.

THE COURT: I would like it because I don't have it, I see the quotation from it here.

MR. CALDWELL: I did not duplicate it, Your Honor, and I have it only in the Daily Labor Report.

THE COURT: Is it in full?

MR. CADWELL: Yes, Your Honor, I believe it is.

THE COURT: Carol, take it down and make—do you have a copy?

MR. POELLNITZ: Yes, sir, one copy.

THE COURT: Take it down and make a couple of copies, Carol.

MR. POELLNITZ: Your Honor, before we get into the further discussion of Mr. Caldwell's remarks, it seems to me that we ought to at least pause a minute and put this thing into focus as to what the practical effect, that is, the irreparable injury that the defendant in the NLRB proceeding will be put in. I think it's maybe not, that maybe the case doesn't turn on that point, but it's certainly appropriate background, and if you'd let Mr. Earnest tell you, he's in charge of that hearing.

THE COURT: I'd like to hear from him. I might mention that I have a difficult time finding,

[Tr. 17]

so I would like to hear it, finding irreparable injury because of the nature and scope of review by the Circuit

Courts of Appeals of NLRB decisions, which scope of review clearly covers denials of Constitutional rights or denial or rights secured by other statutes and related matters.

MR. EARNEST: Well, both Mr. Caldwell and I, Mr. Caldwell presently being with the Board and myself formerly being with the Board and Your Honor being familiar, I'm sure, with the Board procedures—in the trial of the Unfair Labor Practice case of the investigations case, the Court's procedure is that after the witness has testified that upon proper request the Board will turn over any affidavits, statements, like that to the opposing party for his examination at that time. The practical effect is that the—

THE COURT: Using the criminal approach.

MR. EARNEST: Yes, sir. The practical effect that the Administrative Law Judge gives the opposing attorney some few minutes, three to five minutes to examine the affidavit and then he has an opportunity to cross-examine at that time using the affidavit. At the conclusion of that cross-examination, he must turn the affidavit back over. He has no use of that

[Tr. 18]

affidavit with other witnesses, either prior witnesses or following witnesses. He's not entitled to it.

THE COURT: Do they do that pursuant to a rule that they have or just a matter of custom? Why do they give them at the conclusion?

MR. EARNEST: I think maybe Mr. Caldwell could speak to that.

MR. CALDWELL: It is a rule of the Board that upon request after calling the witness they are to produce the statement, and counsel is, to my knowledge, every time in a hearing counsel asks for the affidavit he's allowed to recess and allowed the time necessary he wishes to examine it and there's no particular time limit placed on him by the Judge. If it gets to ge a half hour, unreasonable, of course—but the Judge looks at the length of the affidavit and allows him time to examine it.

THE COURT: Let me ask Mr. Caldwell this question because this bothers me with regard to the Title Guarantee decision, which I've not read. If the Title Guarantee goes out on a 7 A exemption, which I thought I understood you to say it did—

MR. CALDWELL: I think that was the narrow limits of the decision.

THE COURT: If it goes out on a 7 A exemption,

[Tr. 19]

what is the justification for a conclusion by the Court there or by anyone that the enforcement proceedings are interfered with by giving affidavits before the proceeding that the absolutely by the rules of the Board going to be given during the proceeding? What's the justification for showing an interference with the proceeding?

MR. CALDWELL: Well, without going into it extensively, as I understand it, the Court considered the very peculiar nature of a Board proceeding in that many of the witnesses you're calling are employed by and depending on their livelihood with the employer respondent against whom they're going to testify and the Board or the Court considered that an important factor in how they could be affected by turning these over prior to their testimony and that it would interfere or had the tendency to interfere with the enforcement proceedings.

THE COURT: Well, now, they know the identity of these people, don't they?

MR. CALDWELL: No, sir, they don't know the identity and we do not reveal the identity of individuals to whom we talk prior to calling them as a witness. This is a matter of strict confidentiality between the Board and the witness and we don't reveal

[Tr. 20]

to anyone, as a matter of fact, to whom we have talked. Now, some may know or speculate or guess, and of course, the charging party presents certain witnesses to us. He knows who he presents or who he suggests we see. We

may not in all cases be able to see them or they may not give us a statement. When the company cooperates, of course, they know which supervisors they presented to us. They may or may not on occasion know whether that supervisor gave us a statement or not in that that witness may come in to us in private and say I'd prefer not to be involved or give you a statement in the case, or we may see a witness presented by the Union who says I don't wish to be involved or don't want to give you a statement, or one may volunteer, or on occasions a supervisor may come to us voluntarily and say yes, I know about this, let me tell you what happened, and the company may not know that we have talked to the supervisor.

THE COURT: But they will know if you use him.

MR. CALDWELL: If we use him, they will know and they're entitled to the affidavit. I might add this case presents a peculiar or very interesting offshoot in that the respondent asks for the statements of witnesses we'll present and in this case we have

[Tr. 21]

both an Unfair Labor Practice proceeding and a proceeding concerning objections filed by the Union. Now, as the Government attorney representing the public and the Board, we litigate only the Unfair Labor Practice proceeding and we don't litigate the objections except to the extent that they may be encompassed coextensive with the ULP's, Unfair Labor Practices. So, we would call certain witnesses to establish our Unfair Labor Practices and by the same token those will establish certain objections, but there may be other objections filed or may be material relating to objections and we have seen and we have investigated the matter and it's determined a hearing is appropriate and we have witnesses, statements from those witnesses, we're not going to call them.

THE COURT: Then he has no request to that information.

MR. CALDWELL: But under the Freedom of Information Act asking for statements of witnesses in the possession of the Government, as a matter of the public he could reasonably argue he's entitled to those statements as the ones of the witness we're going to call.

THE COURT: Well, he wouldn't be entitled to those under his request.

[Tr. 22]

MR. CALDWELL: No. I agree under this request.

THE COURT: So, you're arguing an academic question.

MR. CALDWELL: Yes. I'm just pointing out that there is this problem and that under the Freedom of Information Act, if you say he's entitled to statements in the possession of the Government as public, not as a private litigant but as a general member of the public, is it reasonable to argue—

THE COURT: That's the only way he stands here is under the Freedom of Information Act is a member of the public.

MR. CALDWELL: So, the fact that he's in litigation and we have statements of witnesses we're going to present doesn't give him any more right than he would if he was a member of the public. The fact we're going to call the witnesses doesn't add to his rights.

THE COURT: That's just his method of ascribing what he wants.

MR. CALDWELL: Yes, Your Honor.

THE COURT: I personally wondered why he described it that way, why he limited himself that way.

[Tr. 23]

MR. EARNEST: I purposely did that for the very argument that he now raises. Let me say with regard to some of the statements that the Board has raised that the Board does have a procedure of sending out subpoenas prior to the hearing.

THE COURT: As to all witnesses?

MR. EARNEST: As to the witnesses that they intend to use. In the past they have not been secretive of about who was received those subpoenas and in fact in

the past have on occasion told me which witnesses were going to be used. Employees also will come up, and I think this is—it's worked well between the employers and the Board because the employer must know who is going to testify so that he can schedule his work force. With regard to the Board's fear of any retribution by the company against people whose names were known ahead of time, quite frankly these individuals would enjoy more protection than those names who were not known. There's a specific section of the Act, Section 884, which prohibits employers from taking action against such individuals, and a company would certainly be at a disadvantage to be put on notice as to who such witnesses were. I really don't share that fear.

In fact, the employer has a—it puts the

[Tr. 24]

employer to a disadvantage should they choose to discipline somebody who in turn has done something warranting discipline and who in turn testifies or is known to be testifying. It's extremely difficult and chancy to discipline somebody who is known to be going to testify or is known to be in favor of Section 7—

THE COURT: Let me get right down to the bottom line of it really. In the final analysis, assuming that I stay where I am, and don't think I'm going to budge from that position that I don't have any business enjoining a proceeding or stopping the proceeding, I don't see any justification for that, we're dealing purely and simply with a Freedom of Information jurisdiction, that, assuming that I stay where I am, and I'm inclined to stay there at the present time, that I consider jurisdiction of this Court properly invoked notwithstanding the failure to exhaust because of the unusual timetable the person who's seeking the information is under, then, if I stay there, are we not then squarely presented with the question, the academic matter of law question of whether statements such as these are exempt under 7 A—

MR. POELLNITZ: Of witnesses who are expected

[Tr. 25]

to testify.

THE COURT: That's right, just a pure matter of law, the one that the Second Circuit wrestled with in Title Guarantee—with the idea, with the idea that if, as the Second Circuit may have held, it is an exemption, summary judgment for the Board or dismissal or what-have-you would be appropriate. If the Second Circuit's decision is not quite as strong as Mr. Caldwell says it is, and he feels pretty good about it, although I happen to disagree and don't feel particularly bound by the Second Circuit, and I were to conclude that it's not an exemption, I still can't enjoin the Board. The only thing I could do, as I see it, would be to direct the Board to give the statements that were requested and they say and that these statements must be delivered pursuant to my order within X days preceding any hearing where those people are going to be called and then leave it to the Board to decide whether it wants to continue its own hearing because of that type ruling or deliver the statements or seek some emergency relief somewhere else. You see what I'm saying?

MR. CALDWELL: I see what you're saying, Your Honor, and I will say if Your Honor issues that order we're certainly not going to be in contempt of this

[Tr. 26]

Court and go ahead with the hearing if you say produce the statements in so many days before the hearing—

THE COURT: But I'm not enjoining the hearing.

MR. CALDWELL: Oh, but you would be, Your Honor, because if we go to the hearing after that kind of an order when you said produce the statements and we failed to produce them—

THE COURT: No. You'd either have to produce the statements or forego the hearing, but that's your choice.

MR. CALDWELL: Yes, and I understand that. We're obviously not going to the hearing, as we have got to postpone the hearing. So, it has the same effect as enjoining the hearing. You might as well, Your Honor, to enjoin the hearing as to say produce them in so many days. Your Honor, this gives this litigant with the Board

greater rights than someone that's not in litigation with the Board under the Public Information Act.

THE COURT: No. If a private individual can come in here and show a need for expeditious receipt of the information he's otherwise entitled to under Freedom of Information Act—let's just say, for example, a person in about to be deported and he seeks from the Immigration officials some documents

[Tr. 27]

that would save him from being deported and he's asked for it and the information was denied, he appealed and the deportation hearing was set, the appeal had not been decided and he came in here, I think that this Court would have jurisdiction, one, to waive the normal exhaustion, two, to enter final judgment, if in fact he's entitled to the information, direct that information forthwith be produced.

MR. CALDWELL: So, you would find in that case, though, Your Honor, irreparble injury, the man being deported.

THE COURT: No. I'm just showing that he has made out a case for entitlement to the information under the Freedom of Information Act and his request for that information has been expedited because of some other circumstances. Do you understand what I'm saying?

MR. CALDWELL: I understand what you're saying, Your Honor, and I'm reading it from the other side, I'm sure. I understand what you're saying, Your Honor, but to me it has the same effect as if you said you are enjoined from holding the hearing until you produce or produce it before you hold a hearing.

THE COURT: Except this: I'm pointing that out because I'm not saying that he's getting more

[Tr. 28]

rights because he's in litigation with the Board, he's getting the same rights as any other person, if, you know, he's entitled to the information. He's geting the same

rights as any other person would be under the Freedom of Information Act. The only thing he's getting is an expedited determination of those rights because of something happening.

MR. CALDWELL: Well, Your Honor, as I understand what you're saying, it seems that you're boing farther in that situation. Being removed from the country until you get the information is a type thing you're showing, in effect, I'm going to suffer irreparable injury unless I get this information very quickly and soon.

THE COURT: Irreparable injury is not—and let's think of another example because I'm not trying to put it on an irreparable situation. I'm trying to put it on a situation that generates a factual basis that says I need help promptly. Maybe it's reparable harm rather than irreparable, but still the reparable harm could justify an expeditious handling of it.

MR. CALDWELL: But you've got to put it on that basis that he's going to suffer harm if you do this.

THE COURT: The point is I could find here

[Tr. 29]

that his harm is reparable harm, that is to say, whatever he may be denied in the forthcoming hearing the Fifth Circuit can straighten out on direct appeal. So, it's reparable. But even though it's reparable, he may, nevertheless, be entitled to an expeditious determination here that he's entitled to that information forthwith.

Now, we all travel on the premise that I conclude that he's entitled to the information notwithstanding what the Second Circuit has said, but let's keep talking on that vein. Let's keep talking on that vein. Let's say that I do determine that they are entitled to this information period, notwithstanding the Second Circuit, I could do one thing. I could say you shall forthwith deliver.

MR. CALDWELL: Yes, Your Honor.

THE COURT: That's the normal, just say give them the information and give it to them before the sun sets tomorrow or whatever.

MR. CALDWELL: Which is the remedy provided by the Public Information Act that you will not refuse to produce.

THE COURT: That's right. But rather than go to that extreme, since you would be raising such a serious objection to it, I would, in effect, be

[Tr. 30]

giving you an option that that type of relief wouldn't give you. I would be saying to you, you give it to him by tomorrow night if you intend to use them at a scheduled hearing or you give them to him by seven days before any hearing that they would be used at. It's relief more than what I would think the NLRB would be entitled to under the Freedom of Information Act if the information is otherwise required to be produced.

MR. CALDWELL: How, Your Honor, is that not the same remedy as to enjoin the Board proceedings which you admit you don't have jurisdiction to do?

THE COURT: I do not and I assert for the record that I don't think I'm entitled to enjoin the Board's proceeding. I am, here again assuming that these are producible, I am vested with jurisdiction and the obligation to tell a private person you are entitled to these documents and to tell a public agency you shall forthwith deliver them to them.

MR. CALDWELL: To that I agree.

THE COURT: If I find that to be the facts and the law in this case, that is a decision I could render.

MR. CALDWELL: Yes, Your Honor.

THE COURT: That is less onerous, seems to

[Tr. 31]

me, to the Board than to say you shall deliver them seven day before a hearing, any hearing. In the first place, he's defined what he wants in relation to what you're going to use at a hearing. So, necessarily, it contemplates something that's going to be used at a hearing.

MR. CALDWELL: All right. But Your Honor, that's

taking the remedy one step, as I see it, beyond the authority granted in the Public Information Act and is doing by indirection a blockage of the Board's hearing in this matter absent compliance with your order. You might as well, Your Honor, say to the Board you are enjoined from holding the hearing until you produce. You're saying produce or you can't hold a hearing.

THE COURT: All right. Let's stop, then. Let's don't go that far. Let's say that we find that they're entitled to the information and I enter an order that says you shall by April 17th deliver to them the statements period.

MR. CALDWELL: Yes, Your Honor.

THE COURT: Have I enjoined your proceedings:

MR. CALDWELL: No, Your Honor, you haven't.

THE COURT: All right. Now, would you rather have that type decision or would you rather have one

[Tr. 32]

that says you shall deliver the statements ten days before any scheduled hearings? Now, which would the Board rather have?

MR. CALDWELL: You really give me a Hobson's choice.

THE COURT: No. One you tell me I don't have authority to do because I'm enjoining your proceeding. I think that helps you.

MR. CALDWELL: All right, Your Honor.

THE COURT: The other one is the one you say I clearly have authority to do but I believe it's the one that you're not going to select.

MR. CALDWELL: I think I am, Your Honor, and I would say this. Maybe someone from the Washington enforcement branch that is more knowledgeable in this area than I am, since I'm committed to General Counsel in this area—but if you say produce by April the 17th the statements, as I read it, you're within the scope of the Freedom of Information Act and we may file a request for a stay and appeal that ruling, as I understand it, and we could go ahead and hold our Board hearing. If you issue that order and that order is strictly within, I

will take the position that that would be strictly within the Freedom of Information and we can appeal that as to whether these

[Tr. 33]

are exempt, and that's ruling strictly on the merits.

THE COURT: But you're going to carry a tough burden to get a stay, aren't you?

MR. CALDWELL: Well, a stay only of your order pending this appeal. I would not relate to the Board's Unfair Labor Practice hearing because your order wouldn't go that far. You follow me?

THE COURT: I say, but you would have a hard time justifying why you're entitled to a stay of that order.

MR. CALDWELL: A stay while we appeal, or at least we could file our appeal to the Court as to your order to produce the statements and we're strictly within the scope of the Freedom of Information Act and whether the exemption 7 A applies because you would be saying, in effect, they're entitled to these statements under 7 or under the Act and they are not exempt under the exemptions, and to that extent I'd say yes, this puts it in the proper posture, the proper form and proper line of progression. But with that order we would still be entitled to go ahead and hold our Board hearing because it was merely a matter of producing within that time frame those statements which we claim are exempt and would not jump over into the right of this Court to enjoin by direct

[Tr. 34]

action or indirect action a Board proceeding. You can say it either way, Your Honor, as I see it. You can say you're enjoined, Board, until you produce or you can say produce and don't hold a hearing until you do and the results are the same that you have enjoined the Board proceeding.

THE COURT: The way they've described the information, it necessarily contemplates your hearing because any direction that I will give to you to produce would have to say you shall produce those statements and affi-

davits of those persons who you intend to call at a hearing in connection with these charges.

MR. CALDWELL: That frames the statements. That's a description of the statements, but that doesn't, as I see it, Your Honor, intrude over to what I say is beyond the Court's jurisdiction which is enjoining of the Unfair Labor Practice hearing that is scheduled before the Board and I think the authority is clear that you can't extend that much farther beyond what you just said.

THE COURT: I think that's correct, but we're traveling academic at this point—

MR. CALDWELL: I hope so, Your Honor. In any event, that is how I would view the interpretation of

[Tr. 35]

the discovery rights, the rights of litigants to enjoin Board proceedings and the extent of the Court's authority under the Freedom of Information Act.

THE COURT: I think your filing of the motion to dismiss or in the alternative summary judgment emphasizes something that I said at the beginning, and that is, that we're dealing here really with a, for all practical purposes, a pure question of law.

MR. CALDWELL: I think we are, Your Honor.

THE COURT: And I don't see any reason not to and, consequently, I hereby order that under Rule 65 we shall advance to trial on the merits to this point in time and that whatever we do will be a final adjudication either finally adjudicating that you're not entitled to anything as the plaintiff or finally adjudicating that as a matter of law the Board is required to produce something so that either side would be in a position to take some further step if necessary. I don't see any reason, in other words, not to advance and consolidate the final hearing on the merits to this hearing here today and it's so ordered.

Have you had a chance to look at the Title Guarantee case?

MR. EARNEST: I have yes.

[Tr. 36]

THE COURT: Does it hold what Bill says it does?

MR. EARNEST: I don't—and I'd have to go back and re-read that part, but I don't think it gets into the jurisdictional end of this at all which I think we may have passed already here. It does get into 7 A, and I think under the 7 B and 7 C, in effect, I felt like gave approval to the District Court's decision. Under 7 A—

THE COURT: I've got to assume that because Mr. Caldwell didn't argue those to me. He argued 7 A.

MR. EARNEST: Under the 7 A, what we have tried to do in our memorandum is while we don't agree—we agreed with the lower court's decision obviously. I think the Fifth Circuit would not have followed the Second Circuit's decision in this case, and even though the decisions we cited to you were prior to the amendment, I think it shows the Fifth Circuit's definition of what might be interference with enforcement proceedings and I think the Board is to prove, not just by an allegation, but to prove what that interference would be. We can see no interference. We have waited until the investigation, investigation of both

[Tr. 37]

of these matters had been completed. We're as close to the hearing as I think we could be and it is not our desire to interfere with that and, frankly, we see no interference.

So, I think the Fifth Circuit has indicated its particular feeling in limiting the scope of the 7 A exemption, and that's in a recent case, I think, of Stokes. That particular case involved, I think, some seeking of records of the Occupational Safety & Health Administration and it did get into the enforcement area. I think that the Fifth Circuit has talked in terms of that. That case may have been since the amendment.

THE COURT: No, no. It was a '73 case.

MR. EARNEST: All right. Your Honor, I would also refer you to the lower court's decision in this regard. I

think that particular case is a well-reasoned decision, the case which we also cited in our memo, memorandum—

THE COURT: Bellingham.

MR. EARNEST: The Bellingham case. I think that covered that point, and its decision, as I read the Bellingham case—and we attached some other cases, too. As I read the Bellingham case, it did not predicate its finding no exemption under 7 A on

[Tr. 38]

the Title VII case. In other words, it found that independent of the Title VII decision was my reading of it. It did cite the Title case in connection with a further exemption which we're really not into.

THE COURT: Mr. Caldwell, it's clear that the burden of establishing an exemption, I think, perhaps rests with the NLRB in this situation. Is there anything unique about the statements or unusual that would cause them to interfere with the enforcement proceeding or is the Board's position with regard to the statements that as a general proposition the giving of virtually any statement would interfere?

MR. CALDWELL: I will have to accept the latter description. There's nothing unique in Board proceedings in these statements, no.

THE COURT: So, we're traveling basically under a situation where you don't need to go forward and make a showing that these particular statements would interfere. We'll assume, I take it, for the purposes of this case that these are just normal statements and that the Board's position would be that these, like any other statements, would interfere.

MR. CALDWELL: Yes, Your Honor, yes.

THE COURT: O.K. All Right. Is there anything else that either of y'all would like to file

[Tr. 39]

or say? I think I understand it. I don't know that I'm able to answer it, but I think I understand it.

MR. CALDWELL: May I have just a moment, Your Honor? I was looking to see if I had a case that would be of some importance.

THE COURT: Please do. Mr. Caldwell, was this an extra copy of the brief?

MR. CALDWELL: Yes, sir. I filed one with the Clerk. Your Honor, I don't believe that I have anything further to offer. I think the Board's argument is fully set forth in Title Guarantee and the cases cited and we rely on that as to the merits of the availability of the statements and the application of 7A.

THE COURT: All Right. Anything further from y'all?

MR. EARNEST: I would like to request that Your Honor take a look at the District Court decision also with regard to that District Court—

THE COURT: Was that reported somewhere?

MR. POELLNITZ: We're getting you a copy of it right now, Your Honor. It's in the Labor Reports. I haven't seen it in Fed. 2d.

MR. EARNEST: It's so new you have a problem of getting it, but I request that Your Honor look at

[Tr. 40]

that.

THE COURT: It's no longer the law, is it?

MR. EARNEST: Of that Circuit, yes, sir.

MR. POELLNITZ: It's an interpretation of the Freedom of Information Act and somebody is going to have to eventually interpret it.

THE COURT: Was the decision in the State of Washington appealed, do you know?

MR. CALDWELL: No, I don't, Your Honor, I'm sorry, but we're appealing a great many of them I'm afraid. We've been sustained and overruled in any number of cases. I would suspect that all of the adverse decisions are being appealed though, Your Honor.

THE COURT: Well, that's an adverse decision. It's as adverse as it can be.

MR. CALDWELL: That's right, and I would say without knowing that one specifically, but I'm sure as a general matter we're filing appeals on all of the adverse decisions.

MR. EARNEST: Your Honor, I would also refer you to the Sears case which I think the Labor Board—I believe it's my Exhibit I attached to the complaint. It's the Supreme Court Sears case, and I think in that particular case, although the issue was not

[Tr. 41]

exactly the one that we're faced here with, the Court did point out in that particular situation that it was not going to make a determination with regard to a Section 7 exemption. It pointed out that the Board had not raised this as a defense in the District Court but first raised it when they got to the Court of Appeals and that the Court of Appeals went ahead and decided against the Board without referring to the Section 7 exemption, and the Court had some language in its decision on that. I don't think there was any definitive one way or the other, but it may help Your Honor with what the mood of the Court may be should they be faced with that, Supreme Court, excuse me, Supreme Court of the United States. I think that the Court also noted in that particular decision that they didn't make the Section 7 exemption claim when the Act was more favorable to it than the present Act is.

THE COURT: All right, then. I will take the matter under submission and hopefully we'll have something on it in the next few days consistent with my other work policy.

MR. POELLNITZ: Thank you, Your Honor.

MR. CALDWELL: Thank you.

CERTIFICATE

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I do hereby certify that the above and foregoing typewritten matter is a true and correct transcript of the stenotype notes of the proceedings herein, taken down by me, and transcribed under my supervision, at the time and place hereinbefore noted.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

/s/ John T. Weaver
JOHN T. WEAVER
Court Reporter

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
)
NORTHERN DISTRICT OF ALABAMA)

I, JAMES E. VANDEGRIFT, Clerk of the United States District Court for the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to forty-two (42), both inclusive, comprise the original pleadings in this action and are herewith attached, as a full, true and correct transcript of the supplemental record on appeal in the matter of ROBBINS TIRE AND RUBBER COMPANY, Plaintiff-Appellee vs. NATIONAL LABOR RELATIONS BOARD, Defendant-Appellant, Civil Action No. 76-H-0528-Northwestern Division, as fully as the same appears of record and on file in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at Birmingham, Alabama, in said District, on this the 17th day of May, 1976.

/s/ James E. Vandegrift
JAMES E. VANDEGRIFT, Clerk
United States District Court

[dated April 20, 1976]

* * * * *

EMERGENCY MOTION FOR STAY PENDING APPEAL

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, the National Labor Relations Board, defendant-appellant herein (hereafter "the Board") moves this Court to stay an order issued by the United States District Court for the Northern District of Alabama, Northwestern Division (Hancock, J.) on April 16, 1976 in the above-captioned matter. In support of this motion, appellants show as follows:

1. On April 15, 1976 appellee filed a Complaint and Application for Temporary Restraining Order in the court below requesting that the Board be compelled, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended 88 Stat. 1563, *et seq.*, to produce written statements obtained either during the course of the Board's investigation of unfair labor practice charges in Board Case No. 10-CA-11762 filed against appellees, or during the course of the Board's investigation of its Board Case No. 10-RC-10410, a contested election. After hearing the matter on April 15, 1976, the district court on April 16, 1976 issued an order compelling the Board to produce the statements of witnesses which the Board would call to testify in the consolidated proceeding on the unfair labor practice charges and the contested election scheduled for April 27, 1976. The Court refused to enjoin the scheduled administrative proceeding, but ordered that the information be produced either on April 22, 1976 or five days before the commencement of the administrative hearing in Board Case Nos. 10-CA-11762, 10-RC-10410. The district court also stated that it would deny any request for a stay pending appeal. The Board has this day mailed a notice of appeal of this order to the district court (Attachment A, *infra*).

2. It is settled law that a stay pending appeal is appropriate when the party seeking the appeal can demonstrate the existence of four factors: (1) substantial likelihood that it will prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay is denied; (3) other parties will not be irreparably harmed if the stay is granted; and (4) the public interest will be served rather than harmed by grant of the stay. *Beverly* v. *U.S.*, 468 F.2d 732, 740-741 (C.A. 5, 1972); *Virginia Petroleum Jobbers Ass'n* v. *F.T.C.*, 259 F.2d 921 (C.A.D.C., 1958), cited with approval by the Supreme Court in *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The Board's motion is supported by all of these traditional criteria for obtaining a stay:

1. *Likelihood of success in the merits.* Every decision of the United States Court of Appeals, both before and after the amendment to the Freedom of Information Act, supports the Board's position in this case that statements of potential witnesses obtained during the investigation of unfair labor practice charges or contested elections are exempt from disclosure prior to the administrative enforcement proceeding under the Freedom of Information Act. See e.g., *Title Guarantee Company* v. *N.L.R.B.*, —— F.2d ——, 91 LRRM 2993 (C.A. 2, 1976); *Wellman Industries* v. *N.L.R.B.*, 490 F.2d 427 (C.A. 4, 1974); *N.L.R.B.* v. *Clement Bros.*, 407 F.2d 1027, 1031 (C.A. 5, 1969).

2. *Irreparable injury to defendants and the public interest.* The district court order requires disclosure prior to the commencement of the unfair labor practice proceeding. Accordingly, unless a stay is granted, the Board must either postpone the scheduled administrative hearing indefinitely pending final disposition of the appeal in this case, risk contempt of the district court's order, or comply with the district court's order and abandon its right to appeal. Since it is clearly not the purpose of the Freedom of Information Act to so impair the Board's ability to carry out the administration of the National Labor Relations Act, a stay of the district court's order would also preserve the public interest in obtaining a speedy resolution of labor disputes.

3. *Lack of harm to the Company.* The grant of the stay would not endanger the existence of the documents the appellee is seeking, nor would it otherwise cause the appellee irreparable injury should it ultimately prevail on appeal. Indeed, the arguments in favor of immediate disclosure in the instant case—that pre-hearing discovery of witnesses' statements would help the appellee prepare its defense to unfair labor practice charges—have no relevance to its rights to information under the Freedom of Information Act. *Title Guarantee Company* v. *N.L.R.B.*, *supra*, 91 LRRM at 2999. In that case the Court noted that under the pre-amendment Exemption 7, the courts had uniformly held that witnesses' statements need not be disclosed because "the substantive effect" of such a ruling "would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings." *Ibid*, at 2994-2995. Accordingly the Court concluded (*ibid.*, at 2999):

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceeding by virtue of a back-door amendment to FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act . . . or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended.

In short the appellee will suffer no injury to rights cognizable under the FOIA.

In other actions under the FOIA, several courts, including the Supreme Court, have found the issuance of a stay appropriate in circumstances similar, if not identical to those presented here. See, e.g., *Polynesian Cultural Center* v. *N.L.R.B.*, where the district court order to produce an affidavit obtained by Board agents (D. Hawaii, Docket No. 74-300), was stayed by Mr. Justice Brennan by order of January 29, 1975 (Docket No. A-625).

WHEREFORE, for reasons stated above, the Board respectfully requests this Court to grant a stay of the order of the District Court pending this Court's resolution of the issue on appeal.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 20th day of April, 1976.

By _____

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[April 22, 1976]

* * * * *

PLAINTIFF-APPELLEE'S RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Defendant-Appellant's Emergency Motion was received today, April 22, 1976, seeking to have the April 16, 1976 Order of the United States District Court for the Northern District of Alabama, Northwestern Division (Han-

cock, J.) (attached hereto as Exhibit A) stayed pending appeal. Plaintiff-Appellee respectfully moves this Court to deny such stay. In support of this its Response, Plaintiff-Appellee shows as follows:

1.

Rule 8(a) of the Federal Rules of Appellate Procedure requires that a stay of an Order must ordinarily be sought in the first instance in the District Court. Rule 8(a) also requires:

> A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, *with the reasons given by the district court for its action.* The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. (Emphasis added)

There is nothing in the District Court's Order (Exhibit A) denying an application for a stay or anything to indicate the District Court ruled on any such request. In fact Defendant-Appellant does not even contend in its Emergency Motion to this Court that it has first sought a stay in the District Court. Defendant-Appellant sets forth on Page 2 of its Emergency Motion that "the District Court also stated that it would deny any request for a stay pending appeal." This naked assertion is not evidenced by the Order (Exhibit A) nor is a sworn affidavit or the transcript of the April 15, 1976 hearing attached to Defendant-Appellant's Motion. Nowhere are set forth the reasons given by the District Court for the alleged statement of denial of a request for a stay.

No portions of the record are attached to Defendant-Appellant's Motion as required by Rule 8(a).

2.

This Court's decision in *Beverly* v. *U.S.*, 468 F.2d 732, 740-741 (5th Cir., 1972), cited by Defendant-Appellant, sets forth the criteria which must be proved before a stay will be granted. *First*, "the accepted standard for review of such a stay is whether or not the trial court abused its sound discretion in denying the stay" (Ibid., p. 740). Here Defendant-Appellant has made only a naked assertion that the District Court said it would deny any request for a stay. Defendant-Appellant has not set forth the District Court's reasons for the alleged denial nor has it proved that the District Court's alleged denial was an abuse of its "sound discretion." "*ADDITIONALLY*" the *Beverly* case required the Defendant-Appellant herein to establish four factors:

1) "the likelihood of his prevailing on the merits on appeal,"
2) "that he is likely to suffer irreparable injury from the denial of the stay,"
3) "that the other parties will not be substantially harmed by the grant of stay," and
4) "that granting the stay will serve the public interest."

(Ibid., p. 741)

1) *Likelihood of prevailing on the merits.* Contrary to Defendant-Appellant's claim of support from "Every decision of the United States Courts of Appeal," this Court in *National Labor Relations Board* v. *Schill Steel Products, Inc.*, 408 F.2d 803 (5th Cir., 1969), permitted plaintiff access to statements and affidavits taken by the National Labor Relations Board during its investigation in a contempt proceeding. In *Schill*, this Court distinguished the case of *NLRB* v. *Clement Bros. Co., Inc.*, 407 F.2d 1027 (5th Cir., 1969), cited in the Motion *sub judice*. This Court pointed out that in *Clement* the respondent sought to discover *all* pre-hearing statement in the Board's possession, not just those made by witnesses from whom the Board adduced testimony. The request in the instant case is the same as was made in the *Schill* case since it

only relates to the *witnesses* which will be called by the Board at the hearing and *not* to *all* statements in the possession of the NLRB.

The District Court also distinguishes the *Title Guarantee Company* v. *NLRB* case, —— F.2d ——, 91 LRRM 2993 (2nd Cir., 1976), which the Defendant-Appellant cites and relies on. In *Title Guarantee* Judge Hancock notes the request was for copies of *all* written statements contained in the NLRB's files and any such statements subsequently available to the NLRB. Such request is broader than the request in the case at hand which only covered those statements which the NLRB would have to produce under its own rules (see 29 C.F.R. § 102.118(b)(1)).

Furthermore, the Order in the instant case is on all fours with the recent case of *Bellingham Frozen Foods* v. *Henderson*, —— F.S. ——,[1] 91 LRRM 2761 (W.D. Wash. 1976). In the *Bellingham* case the Court considered the same contentions made by the Board in its refusal to produce the requested materials in this case and ordered the NLRB to turn over the requested affidavits. The Court also enjoined the scheduled hearing until a reasonable time after the Board produced the requested statements and affidavits. The reasoning of the Court follows:

> ". . . the only issue before the Court is a legal one, to wit, whether Plaintiff is entitled as a matter of law to production of certain requested documents held by the agency, which documents the defendants claim are exempt from disclosure under 5 U.S.C. § 552(b), 5, 7(A), 7(B) and 7(C).
>
> "Plaintiff has been summoned to appear and defend an unfair labor practice charge made against plaintiff resulting in the issuance of a NLRB complaint. A date of March 9, 1976 has been set for the hearing.

[1] Many of the cases cited have not yet been published in the West System. Therefore, for the convenience of the Court we have attached copies of the decisions as reported in the Labor Relations Reference Manual to this Response. At the April 15, 1976 hearing, Defendant-Appellant's counsel stated he was not aware of any appeal to the *Bellingham* decision.

> Prior to the filing of this action, *plaintiff sought and was denied access to any and all statements and/or affidavits obtained by the Board of Witnesses to be called at the unfair labor practice hearing.*
>
> * * *
>
> "The Court is not persuaded by defendants' arguments that the requested documents are exempt from disclosure under Exemptions No. 5, 7(A), 7(C) or 7(D) of the Act. Defendants bear the burden of proving that documents in their possession are entitled to exempt status, and under the Act, all documents not exempt shall be made available to the public.
>
> * * *
>
> "The defendants suggest in their Answer and the Court rejects the argument that the statements and/or affidavits sought here are within the 'inter-agency or intra-agency *memorandums* or *letters*' language of Exemption 5 in the Act. (Emphasis supplied). The cases cited by plaintiff in its Memorandum support the conclusion that the statements requested herein are neither inter- nor intra-agency writings, nor memorandums nor letters which Congress sought to protect from disclosure.
>
> "Defendants assert that the requested documents are also properly exempt under Exemption 7 which bars disclosure of investigative records compiled for law enforcement purposes which would
>
> (A) interfere with enforcement proceedings, * * *
> (C) constitute an unwarranted invasion of personal privacy, [or]
> (D) disclose the identity of a confidential source . . .
>
> As the court found in two other cases raising identical issues (See attached Order, Local 32 v. NLRB, and Naturalike Photo Co. v. NLRB, 91 LRRM 2721, dated February 20, 1976) and so finds here, disclosure of the requested statements will not 'interfere with enforcement proceedings' as set forth in the Act.

The Board has not made any showing that would support the application of the Agency's 'Little Jencks Act Rule', 29 C.F.R., § 102.118(b), to the statements in question here. As the Fifth Circuit noted in NLRB v. Schill Steel Products, Inc., 408 F.2d 803 at 805, 70 LRRM 3280, rehearing denied 408 F.2d 807, 70 LRRM 3280 (5th Cir. 1969), *the statements requested are ones to be disclosed in the course of the hearing anyway.* The administrative trial here in a civil matter, and it is hard to conceive of a reason for applying a rule patterned after the criminal Jencks Act rule in such an agency proceeding. *Indeed, the only effect of applying such a rule is to insure that Bellingham Frozen Foods, Inc. and others similarly situated will not be adequately prepared to defend the unfair labor practice charges pending before them.*

"Promises of confidentiality by an agency to a supplier of information is not in itself enough to render a document exempt from disclosure under the Act. (See Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir., 1973) which applies in principle as well to post-amendment provisions). The Court is persuaded by the reasoning of the cases cited by plaintiff in its Memorandum, including Title Guarantee Co. v. N.L.R.B., —— F. Supp. ——, 90 LRRM 2849, 3238 (S.D. N.Y., Oct. 10, 1975), which have rejected the defendants' reliance on Exemption 7(C), that the statements requested herein are not exempt there under.

"Finally, the Board argues that Exemption 7(D) prohibits the disclosure of the documents in question. The Court rejects this contention as being without merit, since even the agency itself has agreed to provide such documents upon completion of its case in chief." (Emphasis added)

Other Courts have reached the same conclusion in similar cases. See *Maremont Corp.* v. *NLRB*, —— F.S. ——, 91 LRRM 2804 (W.D. Okla. 1976); *St. Elizabeth's Hospital* v. *NLRB*, —— F.S. ——, 91 LRRM 2453 (N.D. Ill. 1976); *Goodfriend Western Corp.* v. *Fuchs*, —— F.S. ——, 91 LRRM 2454 (Mass. 1976); *Local 32* v. *Irving*,

—— F.S. ——, 91 LRRM 2513 (W.D. Wash. 1976); *Cessna Aircraft Co.* v. *NLRB*, —— F.S. ——, 90 LRRM 2376 (Kan. 1975). See also, *Seafarers International Union AFL-CIO* v. *Baldovin*, 508 F.2d 125 (5th Cir. 1975) vacated 511 F.2d 1161.

Hence, contrary to Defendant-Appellant's contention, the likelihood is that Plaintiff-Appellee will prevail on appeal.

2) *Irreparable injury to Defendant-Appellant.* Defendant-Appellant cites no irreparable injury to itself if a stay is not granted. The only effect of not granting the request for a stay will be to cause Defendant-Appellant NLRB to reschedule the April 27, 1976 hearing which it set. It will not waive or lose any rights. These rights are the subject of the appeal. To grant a stay would have the effect of ruling on the merits of this case in favor of Defendant-Appellant, as the hearing relating to these affidavits is scheduled by the NLRB for April 27, 1976. There would be no damage to Defendant-Appellant if the stay is denied and the appeal is allowed to pursue its normal course.

3) *Harm to Plaintiff-Appellee if the stay is granted.* The NLRB's refusal to produce the documents which were requested and to which it is entitled under the Freedom of Information Act, as amended, deprives Plaintiff-Appellee of its statutory right to such information and will deprive Plaintiff-Appellee of a full opportunity to prepare its defense in the forthcoming hearing. See the cases cited under 1) supra and attached hereto.

If the stay is granted the NLRB will proceed with its April 27, 1976 hearing without having previously turned over to Plaintiff-Appellee the requested information. Post-hearing production of this information will be of no value as the record in the April 27, 1976 hearing would already have been made. Plaintiff-Appellee will be substantially injured if the requested documents are not turned over prior to the April 27, 1976 hearing.

4) *Serving the public interest.* The 1974 amendments to the Freedom of Information Act 5 U.S.C. § 552 were passed to protect the public interest. In *Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir., 1973), this Court points out

that the Freedom of Information Act was amended to increase public access to government records through imposition of liberal disclosure requirements limited only by specific narrowly constructed exemptions. In passing these amendments Congress was trying to limit broad agency rules of non-disclosure so the Government might be more responsible and responsive to the public.

Plaintiff-Appellee respectfully submits Defendant-Appellant NLRB has not shown (1) that the District Court abused its discretion nor that (2) the additional four factors have been met warranting a stay of the District Court's Order.

WHEREFORE, for the reasons stated above, Plaintiff-Appellee requests this Court to deny Defendant-Appellant NLRB's Motion for Stay.

Respectfully submitted this 22nd day of April, 1976.

POELLNITZ, COX, ROBISON,
MCBURNEY & JONES

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[Certificate of Service]

[filed April 26, 1976]

* * * * *

Before AINSWORTH, CLARK, and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for stay pending appeal is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2099

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT

Nov. 21, 1977

Appeal from the United States District Court for the Northern District of Alabama before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS, *District Judge*.*

GODBOLD, *Circuit Judge*:

This is a Freedom of Information Act (FOIA)[1] case, although it takes on the troubling coloration of a dispute about the discovery rights of respondents in National Labor Relations Board proceedings. The direct court[2] ordered the NLRB to turn over to Robbins Tire copies of all written statements of those who will be called to testify[3] in a consolidated representation and unfair labor practice proceeding involving that company. The order required that these documents be transmitted "on or before April 22, 1976, or, at the election of the Board,

* Senior District Judge of the Southern District of Florida, sitting by designation.

[1] 5 U.S.C. § 552, *as amended by* Act of Nov. 21, 1974, Pub.L.No. 93-502, 88 Stat. 1561.

[2] 92 L.R.R.M. 2586 (N.D. Ala., 1976).

[3] We do not know how many of those whose statements are sought here are employees of Robbins Tire, since the Board has never disclosed the materials even to the district court in camera. The court found it unnecessary to resort to in camera inspection of the statements because neither party disputed that they were prepared for use in the Board proceeding.

on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness."[4] A panel of this court has denied the Board's motion for a stay pending appeal, and the NLRB hearing has been held in abeyance for over a year pending the outcome of this appeal. We affirm.

[1] First, there is a jurisdictional problem. The Board argues that the effect of the order to disclose statements of witnesses was to enjoin its proceeding against the company. It casts its argument as an exhaustion requirement, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938), and asserting that Robbins Tire would suffer no irreparable injury if forced to challenge the Board's action afterwards on appeal, 29 U.S.C. §§ 160(e)-(f). *See also Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974); 51 St. John's L. Rev. 251, 254 n. 17 (1977). We need not decide whether or when a district court adjudicating a FOIA claim may enjoin ongoing or prospective NLRB proceedings in an effort to compel the disclosure required by the Act. In this case, the district court did not enjoin the hearing. The Board argues that this was the effect of its order. But whether or not an order constitutes an injunction is a question that does not turn on the subjective importance attached to it by the defendant and his resulting action in the circumstances. Like similar orders in the more conventional discovery context, this one gave the NLRB a choice. It could produce the statements, it could proceed without resort to the testimony of these particular affiants or it could forego the hearing. While the unpalatability of this choice might well form part of the rationale for finding a substantive exemption under FOIA,[5]

[4] The company had sought a longer preparation period of seven days.

[5] *See New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377, 384 (Cal., 1976) (denying FOIA disclosure on the merits, under exemption 7(A), for the same reasons). *But see* note 29, *infra*.

it cannot be transformed into a jurisdictional question by the Board's decision to hold its hearing in abeyance.

EXEMPTION 7(A)

The Board asserts that the statements of prospective witnesses fall within exemption 7(A), which protects against disclosure of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, * * *." 5 U.S.C. § 552(b)(7)(A). The issue here is whether pre-hearing disclosure of the contents of statements made by those prepared to testify in support of the Board's case would actually "interfere" with the Board's case. In *Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d 145 (CA1) (per curiam), *cert. denied*, 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976), the First Circuit has held that it would.

[2] We think our answer can be found by ascertaining what Congress meant by "interfere," bearing in mind the dictum that FOIA was a comprehensive effort to publicize all agency action and that its exemptions are to be narrowly construed. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-61, 96 S. Ct. 1592, 48 L. Ed. 2d 11, 21 (1976). As Judge Oakes explained in the leading case of *Title Guarantee Co.* v. *NLRB*, 534 F. 2d 484 (CA2), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976),[6] this language was the result of a change

[6] Judge Oakes' rationale in *Title Guarantee*, which unlike our case did not involve a request limited to statements of prospective witnesses, has been persuasive enough to have formed the basis of every subsequent appellate decision under FOIA involving statements obtained by the NLRB in the course of unfair labor practice investigations. All of these cases have held exemption 7(A) applicable. *Goodfriend Western Corp.* v. *Fuchs*, 535 F.2d 145 (CA1), *cert. denied*, 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976); *New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377 (CA1, 1976); *Roger J. Au & Son, Inc.* v. *NLRB*, 538 F.2d 80 (CA3, 1976); *NLRB* v. *Hardeman Garment Corp.*, 557 F.2d 559 (CA6, 1977); *Abrahamson Chrysler-Plymouth, Inc.* v. *NLRB*, 559 F.2d 1226 (CA7, 1977); *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F.2d 1139 (CA9, 1976); *Waldo Hosp. Ass'n, Inc.* v. *NLRB*, No. 76-3315 (CA9, Mar. 10, 1977) [unpublished Order]; *Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63 (CA10, 1976); *Cessna Aircraft Co.* v. *NLRB*, 452 F.2d 834 (CA10, 1976); *Maremont Corp.* v. *NLRB*, 79 CCH Labor Cases ¶ 77,790 (CA10, Oct. 5, 1976). *But see* 45 Geo.Wash.L.Rev. 114 (1976); 51 St. John's L.Rev. 251 (1977).

Several of these cases have expanded *Title Guarantee's* protections. As noted above, *Goodfriend* extended it to refuse a request limited to statements of those who would testify at a trial scheduled 24 hours later. *New England* applied it to exempt (1) statements of non-employees and (2) statements obtained in closed cases bearing a close temporal and factual relationship to pending cases. *But cf. Harvey's Wagon Wheel* (remanding for an initial determination of the applicability of exemption 7(A) to non-employee statements). Finally, *Climax Molybdenum* treated *Title Guarantee* as a per se rule, eliminating any need for an in camera inspection of the statements as permitted by 5 U.S.C. § 552(a)(4)(B).

On the other hand, *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131 (CA4, 1977), while in dictum accepting the rationale of *Title Guarantee*, has refused to extend exemption 7(A) to protect affidavits in the context of a proceeding to determine only backpay claims after liability has been established.

offered by Senator Hart to the 1974 amendments to the FOIA after the bill had been reported out of committee. The purpose of Senator Hart's proposal was to restore the original intent of FOIA to require the agency to make a particularized showing that an investigatory file's disclosure would harm its case in court. "[I]t is only relevant to make [the exemption 7(A)] determination," Senator Hart emphasized, "in the context of the particular enforcement proceeding."[7] By making this change, Congress sought to eliminate unfounded judicial notions that a document's mere status as investigatory and enforcement-related would be sufficient to justify non-disclosure. Thus, the legislative history of exemption 7(A) reveals a sort of procedural emphasis.[8] Such an

[7] Staffs of House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 333 (Joint Comm. Print 1975) [hereinafter cited as Source Book].

[8] Senator Hart's adoption of a prior ABA Committee proposal suggests that he was particularly concerned with refusals to disclose investigatory files from closed cases. *See* Source Book 334, 336-39, 351. But we view this as simply a particular manifestation of the need to change the exemption to require an inquiry in each

emphasis is strongly supplemented by the tenor of the 1974 amendments even before Senator Hart's change. As Senator Kennedy, the principal author and floor leader of the amendments, remarked, "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions." Source Book 293.

We move next to the more substantive inquiry of what kind of interference Congress was concerned about avoiding in each particular case. Our only real clue lies in the remarks of Senator Hart:

> [Exemption 7(A)] would apply whenever the Government's case in court * * * would be harmed by

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situation as to whether disclosure would actually "interfere." Perhaps closed files might be so closely related to collateral proceedings pending before the agency that disclosure of them would still interfere. *See New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377 (CA1, 1976). Conversely, the particular concern with closed files in the legislative history does not indicate to us a determination that disclosure of files in open cases, simply because they are open, would necessarily qualify as interference under exemption 7(A). *Cf.* 45 Geo. Wash. L. Rev. 114, 124 (1976) (footnotes omitted):

"The *Title* court suggested that exemption 7(A) was enacted in 1974 to resolve the problem of the unavailability of closed investigatory files. The withholding of investigatory files pertaining to closed cases was a particularly egregious abuse of exemption 7 which exemption 7(A) certainly was designed to eliminate. The 1974 amendments, however, were not drafted in terms that require disclosure of closed files and nondisclosure of open files. Congress could have easily formulated such a distinction. The amendments were phrased instead to require agencies to establish under exemption 7(A) that interference with agency enforcement proceedings would result from disclosure. Thus, while the phraseology of exemption 7(A) assumes that nondisclosure can be justified only in the context of a pending enforcement proceeding, it requires the courts to consider whether disclosure would be harmful to that proceeding before granting a 7(A) exemption. This clearly implies that not all documents pertaining to pending proceedings are automatically exempted."

Whether or not all investigatory statements may be per se exempt for other reasons is a question we address below. The point we are making here is that it violates the intent of the Hart amendment to abdicate our responsibility to consider the specific harm to agency processes that disclosure might produce.

> the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding.

Source Book 333.[9]

The first sentence here suggests that the concern was with interference in the rather broad sense of premature revelation. Support for this idea can be found in Senator Hart's earlier statement that he wanted to return to the purpose revealed in the legislative history of the 1966 Act. This purpose was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have." Source Book 332, *quoting* from H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News pp. 2418, 1428. If this is what interference means, then we would be obliged to give an FOIA plaintiff-as-public-citizen no more information than he would obtain as a private litigant engaging in discovery before the agency. In *Title Guarantee*, for example, Judge Oakes began his analysis by observing that disclosure "would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings," given Second Circuit limitations on the duty of the Board to grant pretrial discovery. 534 F. 2d at 487. However, we think that comparative discovery is not the key to the meaning of exemption 7(A).

[3] First, it is questionable whether FOIA disclosure would result in an increase in discovery rights in this court.[10] Although the Second Circuit has held that the National Labor Relations Act does not specifically au-

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[9] The central challenge to Senator Hart's proposal dealt with exemption 7(D) and the problems of safeguarding the confidentiality of informers so as to maintain effective law enforcement information gathering, with particular reference to the efforts of the FBI. *See* Source Book 340-43, 350-51. As a result, little further explication of "interference" exists.

[10] *Title Guarantee* recognized this problem. 534 F.2d at 487 n. 6.

thorize or require the Board to adopt discovery procedures,[11] this court, emphasizing the authority of 29 U.S.C. § 160(b),[12] has held that "when good cause is shown to the Board it should permit discovery in order that the rights of all parties may be properly protected." *NLRB* v. *Rex Disposables*, 494 F. 2d 588, 592 (CA5, 1974), *citing NLRB* v. *Safeway Steel Scaffolds Co.*, 383 F. 2d 273 (CA5), 1967), *cert. denied*, 390 U.S. 955, 88 S. Ct. 1052, 19 L. Ed. 2d 1150 (1968); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994 (CA5, 1968); *cf. NLRB* v. *W. R. Bean & Son, Inc.*, 450 F. 2d 93, 96 (CA5, 1971, *cert. denied*, 409 U.S. 849, 93 S. Ct. 57, 34 L. Ed. 2d 91 (1972) (*Safeway Steel* and *Miami Coca-Cola* place question within discretion of administrative law judge).[13] We have also held more specifically that statements of Board witnesses are discoverable in civil contempt proceedings that the Board brings to challenge noncompliance with appellate court decrees. *NLRB* v. *Schill Steel Products, Inc.*, 408 F. 2d 803 (CA5, 1969).[14] We conclude from these authorities that, with respect to the statements of prospective witnesses, some right to discovery exists

[11] *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 859-60 (CA2, 1970), *cert. denied*, 402 U.S. 915, 91 S. Ct. 1375, 28 L. Ed. 2d 661 (1971).

[12] "[NLRB unfair labor practice proceedings] shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. * * *"

[13] The recent FOIA case of *Sealand Terminal Corp.* v. *NLRB*, 414 F.Supp. 1035 (S.D. Miss., 1976), found the *Rex Disposables* line of authorities unpersuasive arguments for FOIA disclosure because these cases had held that the Board's failure to grant discovery had been harmless error. We do not agree with this logic. We are asking whether FOIA disclosure would give a litigant earlier or greater access to investigatory files than he would otherwise have. For this purpose, it seems irrelevant whether a Board examiner's error in failing to allow pretrial discovery was harmless. Our only injury should be the abstract one of whether the right to discovery exists.

[14] The *Schill Steel* panel left open whether its rule would apply to Board proceedings as well, 408 F.2d at 808, as did *Morgan Precision Parts* v. *NLRB*, 411 F.2d 1210, 1214 & n. 5 (CA5, 1971).

under the National Labor Relations Act.[15] Thus, we cannot agree with the Board's assertion that disclosure of witnesses' statements would inevitably interfere with enforcement proceedings even in the sense that it would always allow litigants greater discovery than they otherwise would obtain.

Second, focusing on comparative discovery rights, even if it gave us a clearer answer, would violate the spirit of the procedural reform sought by the Hart amendment. The change, as we have noted above, sought to require a showing that some "specific harm might result to [the government's] case from disclosure," *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1135 (CA4, 1977). If the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted "only to the extent that * * * production * * * would * * * interfere" in some way. We must interpret the exemptions to give meaning to this requirement.

Finally, tying FOIA rights to the discovery rights of the particular plaintiff presents us with a legal conundrum that suggests the improbability of such a congressional intent. In order to apply the comparative discovery test, we must look to the particular needs of the plaintiff (in order to see whether he has shown good cause for production). But the Act mandates release of information "to any person." 5 U.S.C. § 552(a)(3). For this reason, anyone's case is as strong (or as weak) as anyone else's. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S. Ct. 1504, 1513, 44 L. Ed. 2d 29, 43 n. 10 (1975): "[Plaintiff's] rights under [FOIA] are neither increased nor decreased by reason of the fact that it claims an interest in the [documents sought] greater

[15] We deal with the work product privilege analogy below in addressing the Board's claim under exemption 5. We see no reason why the analogy should provide for any different analysis under exemption 7(A)'s "no earlier or greater access" theory than under exemption 5's express test of "not * * * available by law to a party * * * in litigation with the agency."

Title Guarantee expressly avoided relying on this analogy. 534 F.2d at 491.

than that shared by the average member of the public." Thus, to hold that certain groups—members of the news media, for example—are the real beneficiaries of FOIA is to create a pecking order unjustified by the language of the statute.[16] "[A]ll citizens have a right to know" what their government is doing. S. Rep. No. 813, 85th Cong., 1st Sess. 6 (1965).[17]

[4] In sum, we reject "earlier or greater access" as a kind of interference protected against by exemption 7(A). We think that the protection against interference involves a focus not on the rights of the individual FOIA plaintiff but rather on the problems posed to the particular agency proceeding. We thus proceed to an examination of the possible harms that could befall Board proceedings

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[16] On the other hand, neither can Robbins Tire gain any leverage under FOIA from the particular unfairness caused here by what some have referred to as the Board's "trial by ambush," *see Capital Cities Communications, Inc.* v. *NLRB*, 409 F.Supp. 971, 977 (N.D. Cal., 1976).

[17] Our problem here is quite similar to that posed by exemption 5, which expressly allows the withholding of memoranda "which would not be available by law to a party * * * in litigation with the agency." 5 U.S.C. § 552(b)(5). Professor Davis has noted in this context:

"When a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, letting required disclosure depend upon the facts about the particular applicant would violate the provision that disclosure must be made to 'any person.' The agency cannot say that one person is 'any person' but that another person is not." K. Davis, Administrative Law Text § 3A.21, at 83 (1972). As a result, he says, "the courts in giving meaning to the fifth exemption have been guided less by discovery law than by the policies behind the fifth exemption." K. Davis, Administrative Law of the Seventies § 3A.21, at 92 (1976). *See also EPA* v. *Mink*, 410 U.S. 73, 86, 93 S. Ct. 827, 835, 35 L. Ed. 2d 119, 131-32 (1973); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 620-21 & n. 20 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976).

The exemption 5 problem is one posed by statutory language. The analogous difficulty under exemption 7(A) results from the less persuasive context of remarks in the legislative history. We therefore feel more at liberty to fashion our own definition of interference.

by pretrial disclosure of witnesses' statements.[18] Indeed, a precise reading of *Title Guarantee* reveals that this was the approach taken there. Although, as we have noted, Judge Oakes referred to the expansion of discovery rights, his finding of exemption arose not from the mere conclusion that such rights would otherwise be expanded but from the doubt that Congress intended to so expand them in view of a (judicially perceived) likelihood for interference in the proceedings that might result:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress could be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act wihch, while dealing with disclosure generally, does not purport to affect such discovery.

534 F. 2d at 491-92 (footnotes omitted). Senator Hart's second sentence in his aforementioned explanation of what he meant by interference (a diminished ability to collect investigatory information) suggests a similar judicial inquiry into the precise nature of the harm to the agency's case.[19]

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[18] The Board has the burden of proving any such harm. 5 U.S.C. § 552(a)(4)(B).

[19] We do not interpret *U.S.* v. *Murdock*, 548 F.2d 599, 602 (CA5, 1977), as requiring any different conclusion here. The *Murdock*

As we have noted, *Title Guarantee* involved a request for copies of all statements, without regard to whether the affiants would be called to testify. Part of the rationale for denying the right to disclosure was "the delicate relationship which exists between employer and employees.[20] *See also Roger J. Au & Son, Inc.* v. *NLRB*, 538 F. 2d 80, 83 (CA3, 1976) ("peculiar character of labor litigation"); *Climax Molybdenum Co.* v. *NLRB*, 539 F. 2d 63, 65 (CA10, 1976) ("relationship between employer and employee is a delicate one which calls for limitations on discovery"). There is inherent in this concern an assumption that the Board would be unable to obtain testimony from employees to aid in its prosecution if their statements would become the knowledge of their employer. Even discounting the problem that we do not know which of the affiants here are employees,[21] this sweeping assumption of intimidation is inappropriate here, where the request is limited to statements of witnesses. As this

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panel, dealing with a FOIA plaintiff being prosecuted for criminal tax violations, did go so far as to say:

"We hold the discovery provisions of the Federal Rules of Criminal Procedure and the FOIA provide two independent schemes for obtaining information through the judicial process. Although information obtained through the FOIA may be useful in a criminal trial, we find that the FOIA *was not intended* as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure." (Emphasis supplied.)

As in *Title Guarantee*, which *Murdock* cited, we think the underlying rationale lay not in the comparison of discovery rights per se but rather on the special dangers that discovery would pose to a criminal prosecution. These were so great that Congress could not possibly have intended disclosure. Whether the dangers in this different context are similar is a question we address below.

[20] Indeed, the peculiar problem of intimidation involved in such a relationship explains why the court restricted its holding to NLRB settings. 534 F.2d at 492.

[21] *Title Guarantee* involved employee and union affiants, making no distinction in protecting the statements from disclosure because the court felt that union representatives might also be intimidated, through premature disclosure of their negotiating position. 534 F.2d at 485, 491. *But cf. Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F.2d 1139 (CA9, 1976) (remanding on this point).

court said in *Schill Steel*, "Informers who actually testify * * * surface automatically." 408 F. 2d at 805.[22] As the First Circuit admitted in *Goodfriend*, "it may well be that [such] circumstances minimize the possible interference with the pending proceedings." 535 F. 2d at 147.[23]

In the present situation, there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness during the five days prior to the hearing,[24] done in an effort to silence him or dilute the nature of his testimony. Such harassment would constitute an unfair labor practice under 29 U.S.C. § 158(a)(4) [25] *NLRB* v. *Scrivener*, 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). Any attorney interrogation of the affiants extending beyond "that legitimately necessary for the preparation of respondent's defense" to the underlying unfair labor practice charge would run a risk of incurring section 8(a)(1) liability. *See, e.g., NLRB* v. *Ambox, Inc.*, 357 F. 2d 138, 141 (CA 5, 1966); *Texas Industries, Inc.* v. *NLRB*, 336 F. 2d 128, 132-34 (CA 5, 1964); *NLRB* v. *Hardeman Garment Corp.*, 557 F. 2d 559, 563 n. 9 (CA 6, 1977). Nevertheless, post hoc discipline does not necessarily dissipate the anxieties of those upon whom the intimidation may be visited. We understand the Board's position in this regard, dependent as it is upon charges initiated by others before it issues its complaints. See *NLRB* v. *Sears*,

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[22] *Schill Steel* distinguished *NLRB* v. *Clement Bros. Co.*, 407 F.2d 1027 (CA5, 1969), in part on the basis that the intimidation problem there resulted from the fact that the discovery sought included statements of non-witnesses, *id.* at 1030-31.

[23] In that case the court found interference in the fact that the respondent would gain discovery rights.

[24] Harassment after testimony at trial, of course, would be as likely for a witness with or without prehearing disclosure.

[25] "(a) It shall be an unfair labor practice for an employer—

* * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter; * * *"

Roebuck & Co., 421 U.S. 132, 138-39, 95 S. Ct. 1504, 1510-1511, 44 L. Ed. 2d 29, 40-41 (1975).[26]

[5, 6] However, the Board has not introduced any evidence tending to show that this kind of intimidation (either to physical or employment security) is likely to occur during the five days between discovery and the Board hearing in this case. While we do not purport to establish an exclusive set of criteria for looking at this question, there are numerous factors that bear upon such an inquiry: whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give. *See Temple-Eastex, Inc.* v. *NLRB*, 410 F. Supp. 183 (E.D. Tex., 1976) (ordering disclosure of witness statements favorable to employer).[27] Instead, the Board has asserted

[26] On petition for rehearing in *NLRB* v. *Schill Steel Prods., Inc.*, 408 F.2d 803, 807-08 (CA5, 1969), a panel of this court discounted this problem of intimidation during the period between discovery and trial:

"In the petition here the Board asserts that the prospect of prehearing discovery is somehow more intimidating than the prospect of discovery under the Jencks Act because it will give the employer more time to confront the informing employee. Given that the name of an informer will be revealed, we confess that we are unable to see the connection between added time and substantially greater coercion."

Id. at 807. We reach our conclusion here without considering whether we could draw the same conclusion about human nature as a matter of law in every Board proceeding as opposed to the rather unique context there of discovery in our own court. *See* note 14, *supra*.

[27] The answers to some of these sorts of questions might require in camera inspection pursuant to 5 U.S.C. § 552(a)(4)(B). *Cf. Kent Corp.* v. *NLRB*, 530 F.2d 612, 624 n. 30 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976).

Whether or not courts are "ill-fitted to make such determinations," *Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63, 85 (CA10, 1976), is irrelevant in the face of what we perceive to be a congressional directive to do so. Acoerding to one commentator, even the experts

that in every case the potential for intimidation is so great as to require nondisclosure of all statements and affidavits. This sort of per se approach to exemption 7(A) is inconsistent with the procedural reform effected by the Hart amendment. FOIA requires disclosure absent the agency's ability to prove[28] the applicability of exemption 7(A) in the context of the particular proceeding involved. We hold that the Board has not sustained its burden of proving that the possibility of intimidation in this case through disclosure to Robbins Tire brings exemption 7(A) into play.[29]

EXEMPTION 7(C)

[7] Exemption 7(C) protects these statements and affidavits from disclosure only to the extent that production would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The district court rejected this claim since (1) Robbins Tire seeks disclosure only of statements taken from those scheduled to testify at the Board hearing and (2) the Board's own rules[30]

have "strongly held and widely disparate opinions on the reality of employee fear as an inhibiting factor in securing statements from witnesses." 51 St. John's L. Rev. 251, 268 n. 92 (1977).

[28] The Board's per se rule would not satisfy the burden FOIA imposes even if it had resorted to the sort of conclusory affidavit employed to provide "evidence" of inevitable intimidation in *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F.2d 1139, 1142 (CA9, 1976). The statutory scheme requires proof of adjudicative, not legislative, facts.

[29] It might be argued that the mere delay that this FOIA suit creates to the Board process of enforcing the provisions of the NLRA constitutes exemption 7(A) interference. *New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377, 384 (CA1, 1976). But giving such scope to this exemption would result in a per se rule that any FOIA suit designed to obtain investigatory files would fail if it coincided with a scheduled hearing. For the reasons we have indicated, we think this result inconsistent with the intent of the statute as amended.

[30] 29 C.F.R. § 102.118(b)(1) (1976). This rule, which is modeled after the Jencks Act, 18 U.S.C. § 3500, applies as well to representation cases. 29 C.F.R. § 102.118(c) (1976).

allow disclosure of the statements after the direct examination of the witnesses at that hearing.

We agree. The Board concedes that there is nothing unusual in the nature of personal or family details in these affidavits that suggests the need for protection. *See Title Guarantee*, 534 F. 2d at 489 n. 10 (dictum). In addition, as the district court noted, this is purely a matter of when the witnesses' statements are to be revealed, and there is therefore no privacy interest involved. "Disclosure of this same information is not an unwarranted invasion of the claimants' privacy simply because it occurs before the hearing." *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1136 (CA4, 1977). Accordingly, we need not engage in balancing privacy rights against the right of the public to be informed. *Cf. Department of the Air Force* v. *Rose*, 425 U.S. 352, 370-82 & n. 16, 96 S. Ct. 1592, 1603-1609 & n. 16, 48 L. Ed. 2d 11, 26-33 & n. 16 (1976) (exemption 6).

EXEMPTION 7(D)

[8] This exemption protects against disclosure that would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The Board asserts that section 10058.4 of its Case Handling Manual requires that the affiant "should be told the truth—that the information would be used by us in ascertaining the total picture and that this would be its only use unless and until he might be called on to give information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information." We do not know whether this "express assurance" was given here, and we question how unconditional an assurance of confidentiality it is anyway. However, employee-employer context might in some situations provide "circumstances from which such an assurance could be reasonably inferred." [31] *Cf. Texas Industries, Inc.*

[31] We draw these explanations of what may create confidentiality from language in the conference report on the 1974 amendments to the FOIA:

"The substitution of the term 'confidential source' in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information." Source Book 230 (Conf. Rep. No. 93-138, 93d Cong., 2d Sess. 1974)).

Of course, here the Board has offered no specific evidence concerning the Robbins Tire situation from which a court might draw such a reasonable inference. *See Title Guarantee*, 534 F.2d at 489-90 n. 11 (dictum). Its exemption 7(D) position, like its positions regarding the exemptions already discussed, is a per se one. But the question here, too, is ordinarily one of fact. *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131, 1137 (CA4, 1977).

v. *NLRB*, 336 F. 2d 128, 134 (CA 5, 1964) (importance of preserving confidentiality of employee statements). However, as the district court held, the Board's case under exemption 7(D) fails for the same reason that exemption 7(C) fails: all the statements sought here come from those who are scheduled to testify at trial anyway. If one's identity is certain to be disclosed, we cannot characterize him as one of the sources given either express or implied assurance of confidentiality.[32]

EXEMPTION 5

Finally, the Board asserts that the statements and affidavits taken from prospective witnesses are protected from disclosure by exemption 5, which exempts "interagency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). In contrast with its position on exemption 7(A), the Board has not met

[32] *Cf. Climax Molybdenum Co.* v. *NLRB*, 407 F. Supp. 208, 209 (D. Colo., 1975), *aff'd on other grounds*, 539 F.2d 63 (CA10, 1976); *accord, Mylan Pharmaceuticals, Inc.* v. *NLRB*, 407 F. Supp. 1124, 1127 (W.D. Pa., 1976). These cases argue that all interviewees are potential witnesses and that they therefore can never be considered confidential sources. We do not express an opinion on the applicability of exemption 7(D) with respect to statements of those not scheduled to be called at the Board hearing.

with much success with this argument. *See Title Guarantee*, 534 F. 2d at 492-93 n. 15 (dictum); *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1138, (CA4, 1977); *Marathon LeTourneau Co.* v. *NLRB*, 414 F. Supp. 1074, 1080 (S.D. Miss., 1976).

Exemption 5, which unlike exemption 7 remained unchanged by the 1974 amendments, has been held to encompass the work-product privilege of *Hickman* v. *Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S. Ct. 1504, 1518, 44 L. Ed. 2d 29, 49 (1975); *Kent Corp.* v. *NLRB*, 530 F. 2d 612, 618 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976). The basic disagreement between the Board and Robbins Tire here is whether the distinction between "factual" and "deliberative" materials fashioned in *EPA* v. *Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119, 132 (1972), in connection with executive privilege was intended to be or can be extended to cases involving the work-product privilege. If in fact Congress means to incorporate *Hickman* in all its complexity into exemption 5 as a sort of direct legal transplant, the witness statements in this case would be exempt from disclosure, for *Hickman* protected even relevant and non-privileged witness statements unless production "is essential to the preparation of one's case." 329 U.S. at 511, 67 S. Ct. at 394, 91 L. Ed. 2d at 462 Since as we have noted FOIA prohibits looking at the needs of the particular plaintiff in ruling on the applicability of the exemptions, such statements would not "normally" or "routinely" be disclosed in private litigation. *Sears*, 421 U.S. at 149 & n. 16, 95 S. Ct. at 1515 & n. 16, 44 L. Ed. 2d at 46 & n. 16, *citing* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). On the other hand, if *Hickman* as applied to exemption 5 does not protect factual materials, these statements would have to be disclosed. They constitute purely factual testimony regarding events at the plant.

[9] We think that the *Hickman* privilege as read into exemption 5, like the executive privilege, must be applied consistently with Congress' intent to protect only against

disclosure of governmental policy-making processes.[33] The general concern surrounding exemption 5 was to guard against stifling flexibility of viewpoints before agencies arrive at final institutional decisions. As the House Report noted the exemption was a response to testimony from agency witnesses

> that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl."

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News, pp. 2418, 2427.[34] Since the purpose of exemption 5 was to protect agency deliberative processes, purely factual material such as verbatim witness statements must not fall within it, whether the agency urges upon us the executive or the work-product privilege. *See Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1138 (CA4, 1977).

[10] While the *Mink* Court spoke in the more conventional exemption 5 context of an assertion of executive privilege, we do not interpret its discussion to be restricted to that context. The Court described in some detail the difficult language as well as the legislative history of exemption 5. While noting the problems involved in applying discovery analogies without inquiring as to individual need,[35] the Court observed that one thing about

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[33] As noted above, we must construe FOIA exemptions narrowly. *Rose*, 425 U.S. at 360-61, 95 S. Ct. at 20-21, 48 L. Ed. 2d at 21. With respect to exemption 5 in particular, see S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) ("The committee * * * has attempted to delimit the exception as narrowly as consistent with efficient Government operation.").

[34] *See also* Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi. L. Rev. 761, 795 & n. 88 (1967); Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 Harv. L. Rev. 1047, 1049 & nn. 11-12 (1973).

[35] *See* note 17, *supra*.

exemption 5 was certain: "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection.'" 410 U.S. at 86, 93 S. Ct. at 836, 35 L. Ed. 2d at 132.[36] Justice White supported this position by citing the House and Senate reports to which we have referred. He then articulated the deliberative-factual distinction, and in doing so cited cases such as *Soucie* v. *David*, 448 F. 2d 1067 (CADC, 1971). *Soucie* was not confined to the executive privilege context; there the D.C. Circuit was promulgating broad guidelines for the handling of the exemption 5 issue on remand. *See also Bristol-Myers Co.* v. *FTC*, 424 F. 2d 935 (CADC), *cert. denied*, 400 U.S. 824, 91 S. Ct. 46, 27 L. Ed. 2d 52 (1970) (cited in *Mink*). Finally, Justice White explained that the first version of exemption 5 had definitively exempted only "memorandums or letters dealing solely with matters of law and policy."[37] The only reason for the change in final wording was not to weaken this deliberative-factual distinction but to assure that factual material inextricably intertwined with deliberative material would also be exempt. *Mink*, 410 U.S. at 90-91, 93 S. Ct. at 837, 35 L. Ed. 2d at 134. *Mink's* extensive analysis of exemption 5 as a whole shows that the case should properly be read as an exemption 5 case, not simply an executive privilege case. It paints with a broad brush, like other decisions both before and after it. *See, e.g., National Courier Association* v. *Board of Governors*, 516 F. 2d 1229, 1242 (CADC, 1975); *Schwartz* v. *IRS*, 511 F. 2d 1303, 1305 (CADC, 1975); *Tennessean Newspapers, Inc.* v. *FHA*, 464 F. 2d 657, 660 (CA6, 1972); *Soucie, supra; GSA* v. *Benson*, 415 F. 2d 878 (CA9, 1969). This court has described exemption 5 in the following way:

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[36] Cf. Sears, 421 U.S. at 154, 95 S. Ct. at 1518, 44 L. Ed. 2d at 49:

"Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy."

[37] In fact, S. Rep. No. 1219, 88th Cong., Sess. 13-14 (1964), accompanying this version noted that "there is no exemption for matters of a factual nature."

THE "MEMORANDUM" EXCEPTION

> * * * Whatever may be the scope of this exception, with its cryptic limiting phrase "which would not be available by law to a party other than an agency in litigation" * * * we think it would be a perversion of the Act to classify the materials sought in this case [OSHA training manuals] as within this provision which is designed to encourage the free exchange of ideas among government policymakers. It was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum. *Bristol Myers Co.* v. *F.T.C.*, 424 F. 2d 935 (D.C. Cir.), cert. denied, (1970). Substance not form determines its availability by the public. * * * The subject manual is an impersonal, mass-produced statement of established policy designed to be utilized as an educational and reference tool, not for policymaking or deliberative purposes. If this material be a "memorandum" then the term would cover virtually all government documents of any description or nature. Such an interpretation would be at war not only with the plain meaning of the word but also with the spirit and purpose of the Act. Whatever the ultimate scope of this "memorandum" exception may be, we are confident that these materials would remain without its reach.

Stokes v. *Brennan*, 476 F. 2d 699, 703-04 (CA5, 1973). There is no suggestion here that the factual-deliberative distinction only defines the scope of the executive privilege. It is inherent in the purpose of exemption 5.

Indeed, we suggested the answer to this case in *Kent Corp.* v. *NLRB*, 530 F. 2d 612, 623-24 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976), in which we held protected under exemption 5 "final investigation reports" prepared by NLRB staff members. These reports summarized the evidence of un-

fair labor practices (gained by witness interviews such as those actually requested here) and recommended dispositions as to the various charges. Discussing the work-product privilege and *Hickman*, we held that even the factual information contained in these reports was protected. But our approach emphasized the deliberative nature of the report process into which these facts were integrated and contrasted these documents with the precise sort of "primary information" that is involved in this case:

> In our view, even the factual matters in these reports (which might not be protected by executive privilege) are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor*, 329 U.S. at 511, 67 S.Ct. at 393, 91 L. Ed. at 462. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials.
>
> This case is a particularly strong one for recognizing the privilege. *The contents of the reports are not primary information, such as verbatim witness testimony or objective data*, but rather are mainly reports on how the Birmingham attorneys appraised the evidence they found. Thus the reports consist largely of "mental impressions, conclusions, opinions, [and] legal theories" within the meaning of the Federal Rule. Such materials, if prepared in anticipation of litigation or for trial, are always protected by a properly-raised claim of work product privilege, regardless of the opposing litigant's need.

530 F. 2d at 624 (emphasis added).

Mink, *Stokes*, and *Kent* all admit the difficulties involved in administering a statutory standard that ordinarily turns on individual need but prohibits courts from

assessing such factors in the FOIA context. *See* note 17, *supra*. Whether as in *Stokes* we resolve the problem by focusing on the word "memorandum" and concluding that factual witness statements are not encompassed within that term,[38] or whether we conclude that in constructing its exemption 5 discovery analogy Congress had no inkling of the ramifications of the qualified part of the *Hickman* privilege,[39] we cannot reconcile withholding these statements with exemption 5's narrow policy of safeguarding the thought processes of the agency as an institutional thinker.

The Board has failed to sustain its statutory burden of proof as to exemptions 7(A), 7(C), 7(D), and 5. The district court's order compelling disclosure is affirmed.

AFFIRMED.

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[38] *See also Title Guarantee Co.* v. *NLRB*, 407 F.Supp. 498, 502 (SDNY), *rev'd on other grounds*, 534 F. 2d 484 (CA2), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

[39] For a fuller description of these two approaches, see Note, supra, note 34, at 1049-51.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2099

D.C. Docket No. CA76-H-528 NW

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE,

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Northern District of Alabama

Before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS, *District Judge**

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was urged by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1977.
Issued as Mandate: December 13, 1977.

---

*Senior District Judge of the Southern District of Florida, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 77-911

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ROBBINS TIRE AND RUBBER COMPANY

ORDER ALLOWING CERTIORARI

Filed February 21, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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Supreme Court, U. S.
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No. 77-911

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBBINS TIRE AND RUBBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBBINS TIRE AND RUBBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–26A) is reported at 563 F. 2d 724. The memorandum opinion of the district court (Pet. App. C. pp. 28A–34A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 27A) was entered on November 21, 1977. The petition for a writ of certiorari was filed on December 23, 1977, and was granted on February 21, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pre-hearing disclosure of statements of prospective witnesses obtained by the National Labor Relations Board [1] in an investigation that has culminated in a pending unfair labor practice proceeding would "interfere with enforcement proceedings," so that the statements are exempt from disclosure under Exemption 7(A) of the Freedom of Information Act ("FOIA").

2. Whether such statements are exempt from disclosure under Exemption 5 of the FOIA as the work product of an attorney prepared in contemplation of litigation.

STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C. (1976 ed.) 552, are as follows:

> Public information; agency rules, opinions, orders, records, and proceedings.
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of

[1] The petition was filed on behalf of the Board and its General Counsel. Under Section 3(d) of the National Labor Relations Act, as amended, 61 Stat. 139, 73 Stat. 542, 29 U.S.C. 153(d), the General Counsel of the Board has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *." References to the "the Board" include the General Counsel acting in his independent capacity.

> this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (4) * * *
>
> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes but only to the

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extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

A. THE BOARD PROCEEDINGS

Upon a petition filed by the Aluminum Workers International Union, AFL–CIO ("the Union"), the Regional Director of the National Labor Relations Board conducted a representation election among a unit of employees of Robbins Tire and Rubber Company ("the Company") on October 9, 1975; 244 votes were cast for the Union, 248 against it, and 10 ballots were challenged (A. 11). The Union filed timely objections alleging that the employer had impermissibly interfered with the election. The Regional Director investigated the challenges to the ballots and the objections to the election, and recommended to the Board that 7 of the challenged ballots be counted, and, if they did not result in the Union's receiving a majority of the votes cast, that a hearing be held on certain of the Union's objections (A. 11–23). The Board adopted the Regional Director's recommendations (A. 24–25).

Meanwhile, on March 26, 1976, the Regional Director issued an unfair labor practice complaint against the Company alleging that it had committed numerous violations of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), as amended, 61 Stat. 140, 29 U.S.C. 158(a)(1), during the preelection period, including (1) interrogating employees about their union activities; (2) promising benefits if the employees rejected the Union; (3) threatening that if the Union were selected it would discharge prounion employees, close the plant, withdraw benefits, and refuse to bargain (A. 28–35). A hearing on the complaint was scheduled for April 27, 1976 (A. 34–35).

When a count of the challenged ballots failed to resolve the election in the Union's favor, it was necessary to hold a hearing on the Union's contentions that the election should be set aside because of the employer's conduct. Since the conduct covered by the Union's objections was largely identical to that covered by the unfair labor practice complaint, the Regional Director consolidated the two proceedings

and set the objections down for hearing at the same time as the hearing on the complaint (A. 5).

On March 31, 1976, the Company, invoking the Freedom of Information Act (FOIA), 5 U.S.C. 552, wrote the Regional Director requesting that he make available for inspection and copying, at least seven days prior to the start of the hearings, copies of all written statements, signed or unsigned, contained in the Board's case files with respect to witnesses whom the Board intended to call (A. 37–38). The Regional Director denied this request on the ground that the information was privileged against disclosure under Exemptions 5 and 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5), (7)(A), (C) and (D) (A. 39–42). The Company appealed the Regional Director's denial to the General Counsel of the Board (A. 43–45). The General Counsel sustained the Regional Director (Pet. App. E, pp. 37A–39A).

B. THE FOIA SUIT

On April 15, 1976, before it had received the General Counsel's decision on its appeal, the Company filed this action in the United States District Court for the Northern District of Alabama, pursuant to the FOIA, 5 U.S.C. 552(a)(4)(B), alleging that the statements sought were records that the Board was required to disclose under 5 U.S.C. 552(a)(3). The Company sought, *inter alia,* a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, an order requiring the Board to produce the requested statements for inspection and copying at least seven days prior to the start of the hearing, and a permanent injunction enjoining the Board from holding its hearing until this condition had been met (A. 3–8).

After a consolidated hearing on the merits of the complaint and the application for a preliminary injunction, the district court rejected the Board's claim that the statements sought were protected against disclosure under Exemptions 5 and 7, and it ordered the Board to provide the statements for inspection and copying on or before April 22, 1976, or, at the Board's election, at least five days prior to any hearing where the person making the statement or affidavit would be called as a witness (Pet. App. C, pp. 28A–34A; Pet. App. D, pp. 35A–36A).

The court of appeals affirmed (Pet. App. A). It concluded that Exemption 7 of the FOIA, which protects against disclosure of investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, is inapplicable unless an agency shows that disclosure would interefere with a particular enforcement proceeding (*id.* at 11A–12A). Since the Board had not introduced any evidence tending to show that intimidation of those witnesses giving statements to the Board was likely to occur in this case during the five days between discovery and the Board hearing, the court held that the Board had not "sustained its burden of * * * bring[ing] exemption 7(A) into play" (*id.* at 17A).

The court of appeals also concluded that Exemption 5, which protects against disclosure of " 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency,' " was inapplicable to "purely factual material such as verbatim witness statements" (*id.* at 20A, 22A). The court acknowledged (*id.* at 21A) that Exemption 5 incorporates the work-product privilege of *Hickman* v. *Taylor*, 329 U.S. 495, which generally protects even relevant and non-privileged witness statements unless production is essential to the preparation of one's case. The court reasoned, however, that the *Hickman* privilege as read into Exemption 5 "must be applied consistently with Congress' intent to protect only against disclosure of governmental policy-making processes" (*ibid.*).

SUMMARY OF ARGUMENT

I

The Fifth Circuit's conclusion in this case—that absent proof of the likelihood of intimidation of particular witnesses, statements obtained by the Board during an investigation that culminates in a pending unfair labor practice proceeding are not protected from pre-hearing disclosure by Exemption 7(A)—sanctions the general use of the FOIA as a discovery device in such proceedings. This construction of the FOIA will mark a radical departure from the Board's present procedures, and will seriously impair the Board's ability to carry out its statutory functions.

Congress did not intend such a result; the FOIA did not purport to sanction such discovery or to override the strict limitations that the Board and the courts have traditionally placed on discovery because of the potential for intimidation and harassment inherent in the relationship between employer and employee.

A. Neither the National Labor Relations Act, nor the procedures established thereunder, provide for pre-hearing disclosure of witness statements. The Board, by rule, has provided that a pre-trial statement will be available to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1). The Board's rule is "reasonably designed to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *National Labor Relations Board* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2).

B. Exemption 7 of the FOIA, as originally enacted in 1966, 80 Stat. 251, protected against disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." The legislative history indicates that the exemption was intended (1) to prevent premature disclosure of the government's investigation, so that it could present its strongest case at trial and (2) to protect government sources, so that persons would volunteer information without fear of reprisal. One of the specific purposes of Exemption 7 was to pro-

tect Board witness statements from pre-hearing disclosure. Finding that the pre-hearing disclosure of Board witness statements would impair the objectives embodied in Exemption 7, the courts uniformly concluded that the exemption protected those statements against such disclosure. See *Wellman Industries, Inc.* v. *National Labor Relations Board,* 490 F. 2d 427 (C.A. 4), certiorari denied, 419 U.S. 834.

C. In 1974, Exemption 7 was amended, in pertinent part, to cover: "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings * * *." The amendment was aimed at a series of decisions by the courts of appeals which had interpreted Exemption 7 as covering any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether an enforcement proceeding were still contemplated in that case, or even whether the information was otherwise available to the public. There is no indication that Congress intended this amendment to overrule the cases holding that witness statements obtained by the Board in an investigation of a particular case were exempt from disclosure under the original Exemption 7, or to enlarge dramatically the scope of discovery under the National Labor Relations Act. Indeed, Senator Hart, a sponsor of the amendment, stated that the amendment would continue to bar disclosure whenever the government's case in court would be harmed by the premature release of evidence or information not in the possession of known or potential defendants.

Accordingly, the courts of appeals considering the question—with the exception of the Fifth Circuit here—have adopted the reasoning of the Second Circuit in *Title Guarantee Co.* v. *National Labor Relations Board,* 534 F. 2d 484, certiorari denied, 429 U.S. 834. The Second Circuit held that pre-hearing disclosure of statements obtained by the Board from employees and their representatives would "interfere" with pending enforcement proceedings in two ways: "first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *." 534 F. 2d at 491.

"The labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings." *Climax Molybdenum Co.* v. *National Labor Relations Board,* 539 F. 2d 63, 65 (C.A. 10). Even where the request is for the statements of only those witnesses scheduled to testify there is a "possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * *.'" *Goodfriend*

Western Corp. v. *Fuchs,* 535 F. 2d. 145, 147 (C.A. 1), certiorari denied, 429 U.S. 895.

The court of appeals' rule that Exemption 7(A) applies only where the Board can show that particular witnesses are likely to be intimidated is unrealistic and unworkable. As the courts have recognized, intimidation (and its likely prospect) "may be subtle and not susceptible of proof." *National Labor Relations Board* v. *Hardeman Garment Corp.,* 557 F. 2d 559, 562, n. 8 (C.A. 6). In any event, determining on a case-by-case basis whether disclosure of a particular statement would interfere with Board enforcement proceedings is a task for which the courts are not equipped, and it would be likely to result in crippling delays in Board proceedings.

II

Board witness statements also are protected from disclosure by FOIA Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This Court has held that Exemption 5 protects documents which are "normally privileged in the civil discovery context," and that it incorporates not only the government's executive privilege, but also the "attorney work product privileg[e]." *National Labor Relations Board* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 149. As the court of appeals recognized, the witness statements requested here fall within the work product privilege, as defined in *Hickman* v. *Taylor,* 329 U.S. 495, because

they are documents prepared in anticipation of litigation by attorneys or those working with attorneys.

The Fifth Circuit's conclusion that Exemption 5 protects only agency deliberative processes ignores the critical difference between the executive privilege and the work product privilege. Because the purpose of executive privilege is to encourage frank discussion of legal and policy matters among agency personnel by shielding such deliberations from public scrutiny, materials reflecting deliberative or policy making processes stand on a different footing from purely factual material, which would not ordinarily reveal the deliberative process. This reasoning is inapplicable to the attorney work product privilege, which by definition is a privilege encompassing all the materials that an attorney has prepared in anticipation of litigation. Since disclosure of factual material in an attorney's files would violate the protected status of those files no less than would the disclosure of deliberative material therein, the work product privilege incorporated in Exemption 5, unlike executive privilege, protects both types of material.

ARGUMENT

I. WITNESS STATEMENTS OBTAINED BY THE NATIONAL LABOR RELATIONS BOARD IN CONNECTION WITH A PENDING UNFAIR LABOR PRACTICE PROCEEDING ARE EXEMPT FROM PRE-HEARING DISCLOSURE UNDER EXEMPTION 7(A) OF THE FOIA

Because witnesses in labor litigation are especially susceptible to retaliation, coercion, or influence by

either the employer or union, the Board's rules do not provide for general pre-hearing discovery; the statements of a witness called to testify by the General Counsel or the charging party are made available to the opposing party for cross-examination only after the witness has testified. When the FOIA was enacted in 1966 (80 Stat. 250), one reason for the inclusion of Exemption 7 was to ensure that the Act would not require the pre-hearing disclosure of witness statements in Board enforcement proceedings.

There is no indication that Congress intended the 1974 amendment to Exemption 7 to overrule the cases holding that witness statements obtained by the Board in an on-going case were exempt from disclosure under the original Exemption 7. Nor is there any indication that Congress intended the FOIA—which was designed to inform the public about agency actions, not to benefit private litigants—to enlarge dramatically the scope of discovery under the National Labor Relations Act. Since pre-hearing disclosure of witness statements obtained by the Board in unfair labor practice investigations would interfere with the Board's enforcement proceedings, Exemption 7(A) protects such statements from disclosure.

A. NEITHER THE NATIONAL LABOR RELATIONS ACT, NOR THE PROCEDURES ESTABLISHED THEREUNDER, PROVIDE FOR PRE-HEARING DISCLOSURE OF WITNESS STATEMENTS

Section 6 of the National Labor Relations Act (NLRA), 29 U.S.C. 156, which empowers the Board to make "such rules and regulations as may be necessary to carry out the provisions of this Act," leaves

the question whether to adopt pre-hearing discovery procedures to the Board's discretion. See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 858 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631, 635 (C.A. 9); *D'Youville Manor, Lowell, Massachusetts, Inc.* v. *National Labor Relations Board*, 526 F. 2d 3, 7 (C.A. 1); *National Labor Relations Board* v. *Valley Mold Co.*, 530 F. 2d 693, 695 (C.A. 6). The Board's rules provide that a pre-trial statement will be furnished to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing * * *," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1).[2] The Board's rule is founded upon the need "to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *National Labor Retions Board* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2). One court of appeals described the "strong reason to maintain the confidentiality of employee statements and good reason for the Board's policy of not disclosing such statements to employers," as follows:

> Statements made during an investigation by employees to Board agents may and often do

[2] This rule is analogous to the Jencks Act (18 U.S.C. 3500), applicable to criminal proceedings, which "manifests the general statutory aim to restrict the use of [witness] statements to impeachment." *Palermo* v. *United States*, 360 U.S. 343, 349.

> reveal an employee's and his co-workers' attitudes and activities in relation to a union and their employer. If an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement, a circumstance complicating a determination of the actual facts in a labor dispute.

National Labor Relations Board v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).[3]

Following the same reasoning, the courts of appeals have upheld the Board's conclusion that an employer restrains or coerces employees, in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by interrogating them to learn whether they gave a statement to a Board investigator, or asking them for a copy of such statement. See *Texas Industries, Inc.* v. *National Labor Relations Board*, 336 F. 2d 128, 133–134 (C.A. 5); *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 752–753 (C.A. 6); *Henry L. Siegel Co.* v. *National Labor Relations Board*, 328 F. 2d 25, 27 (C.A. 2). See also *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117, 121–122 ("'Congress has made it clear

[3] Similarly, the pre-trial disclosure of the statements of union representatives would entail "the danger of their withholding relevant information for fear of exposing crucial material regarding pending union negotiations * * *." *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board*, 550 F. 2d 1139, 1143 (C.A. 9); *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F. 2d 484, 491 (C.A. 2), certiorari denied, 429 U.S. 834. See *United States* v. *Northside Realty Associates, Inc.*, 324 F. Supp. 287, 295–296 (N.D. Ga.).

> that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.* * *' This complete freedom is necessary * * * 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.' ").

The Board's limitation on pre-hearing discovery substantially minimizes the inhibiting effect of potential coercion or harassment of witnesses. Because many persons would be reluctant to volunteer information to Board investigators if they know that their names or the information they provide will be revealed, the Board's practice is to assure affiants that the information they furnish will remain confidential unless and until they are called to testify at a formal hearing (or in the unlikely event that another agency makes a valid request for the information). N.L.R.B. Case Handling Manual, Part I, Section 10058.4. Although a person who gives a statement to a Board investigator knows that if he testifies at a Board hearing, his statement may be given to the employer or union for use in cross-examination, this potential chilling effect is minimized by the facts that the vast majority of unfair labor practice proceedings are disposed of without hearing, and that most persons who give such statements are never called upon to testify.[4] More-

[4] More than 94 percent of all unfair labor practice cases closed during fiscal year 1976 were closed prior to hearing (*National Labor Relations Board Forty-First Annual Report* 222 (1976)), and many affiants who gave statements in the remaining six percent of the cases were not called to testify because their testi-

over, even when a witness is called, his statement is made available only for use in cross-examination,[5] and any portion of the statement that does not relate to the subject of the witness's testimony or the issues raised by the pleadings is excised.[6]

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mony would have been cumulative or irrelevant to the issues ultimately framed in the complaint.

The agency's ability to dispose of such a high percentage of cases prior to hearing is dependent on its ability to conduct a sufficient investigation, which, in turn, is dependent on its ability to assure persons that the information that they furnish will be kept confidential except in special circumstances.

[5] The respondent has no right to retain copies of the statement unless it is admitted into evidence. See Section 17380.11, National Labor Relations Board Manual, Division of Judges; *Manbeck Baking Co.*, 130 NLRB 1186, 1189–1190.

[6] Board's Rule 102.118(b)(2), 29 C.F.R. 102.118(b)(2) provides:

"(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge in camera. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholdings, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an

The Board's decision not to provide for pre-trial discovery does not, however, result in unfair surprise to the respondent, or "trial by ambush." *Capital Cities Communications, Inc.* v. *National Labor Relations Board,* 409 F. Supp. 971, 977 (N.D. Cal.). Any complaint must contain a clear and concise description of the acts which are claimed to constitute unfair labor practices. 29 C.F.R. 102.15. The Administrative Law Judge may grant a motion for a bill of particulars, or for a more definite statement, if the complaint is not sufficiently clear. Also, the Administrative Law Judge is empowered to "hold conferences for the settlement or simplification of the issues * * *." 29 C.F.R. 1002.35.

In preparing for trial, an employer or union may not interrogate employees to learn if they have made a statement to Board investigators or to learn the contents of such a statement. A respondent, however, may interview persons having knowledge of the events, including employees, about specific matters alleged in the complaint. See *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 743 (C.A.D.C.), certiorari denied, 341 U.S. 914; *May Department Stores Co.,* 70 NLRB 94, 95. Finally, when the possibility of settlement is real, the Regional Offices are directed to "openly discuss" with the respondent the nature of the General Counsel's evidence on specific violations, but without revealing the names

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order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness."

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of witnesses. See General Counsel Memorandum 76–110, Program to Improve Settlements and Election Agreements, Labor Relations Yearbook 315, 317 (1976).

Contrary to the conclusion of the other courts of appeals, which recognize that the NLRA leaves the question of discovery to the Board's discretion (see pp. 14–16, *supra*), the Fifth Circuit has held that the discovery procedures of the Federal Rules of Civil Procedure are applicable to the Board by virtue of Section 10(b) of the NLRA, 29 U.S.C. 160(b), which provides that any "[unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States and under rules of civil procedure for the district courts of the United States * * *." See *National Labor Relations Board* v. *Safeway Steel Scaffolds Co. of Georgia*, 383 F. 2d 273, 276–277 (C.A. 5), certiorari denied, 390 U.S. 955; *National Labor Relations Board* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994, 996 (C.A. 5); *National Labor Relations Board* v. *Rex Disposables Division of DHJ Industries, Inc.*, 494 F. 2d 588, 592 (C.A. 5); Pet. App. 8A–9A.[7]

[7] The Fifth Circuit also views Section 102.30 of the Board's rules, 29 C.F.R. 102.30, which permits the taking of depositions upon good cause shown after issuance of a complaint, as providing for pre-trial discovery. See *e.g.*, *Safeway Steel Scaffolds Co.*, *supra*, 383 F. 2d at 277; *Miami Coca-Cola Bottling Co.*, *supra*, 403 F. 2d at 996.

Rule 102.30 does not, either on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pre-hearing discovery. The predecessor of the present Board Rule 102.30 was adopted and became effective in 1935, three years before the promulgation of Fed. R. Civ. P. 26, which permits litigants in the federal courts to take depositions "for the purpose of discovery." The Board rule, in contrast, was patterned after former Equity Rule 47 (superseded by Rule 26), which permitted the taking of depositions only "upon good and exceptional cause" for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery. The Board rule has not changed substantially, and the Board has consistently construed it as requiring more than a showing that the taking of depositions would aid counsel in the preparation of his case for trial. See *Mastro Plastics Corp.*, 136 NLRB 1342, 1344, n. 7, enforced in relevant part, 354 F. 2d 170 (C.A. 2), certiorari denied, 384 U.S. 972; *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296; *Plumbers and Steamfitters Union Local 100*, 128 NLRB 398, 400, enforced, 291 F. 2d 927 (C.A. 5); *Del E. Webb Construction Co.*, 95 NLRB 377, n. 2.

This analysis of Section 10(b) is erroneous and has been rejected by the other courts that have considered the question. As the Second Circuit pointed out in *National Labor Relations Board* v. *Interboro Contractors, supra*, 432 F. 2d at 859:

> On its face [Section 10(b)] regulates the introduction of evidence at Board hearings, without imposing on the Board any particular pre-trial procedures—such as discovery—which do not by any standard constitute rules of evidence. The legislative history of section 10(b) confirms this. Under the original Act, section 10(b) provided that "[i]n any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." This provision was heavily criticized on the ground that it allowed too much incompetent evidence to get into the record of Board hear-

> ings. It was solely to meet that criticism that section 10(b) was amended in 1947. * * * [8]

See also *D'Youville Manor, Lowell, Massachusetts, Inc.* v. *National Labor Relations Board*, 526 F. 2d 3, 7 (C.A. 1).

B. EXEMPTION 7 OF THE FOIA, AS ORIGINALLY ENACTED, PROTECTED BOARD WITNESS STATEMENTS AGAINST PRE-HEARING DISCLOSURE

The express congressional purpose in enacting the FOIA in 1966 was to provide public access to information regarding the workings of government in order to give practical effect to the "theory of an informed electorate * * * vital to the proper operation of a democracy," while at the same time protecting "certain equally important rights of privacy" and valid governmental interests in maintaining the confidentiality of certain investigatory material. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).[9] President Johnson explained in signing the FOIA:[10]

[8] The House Report noted, H.R. Rep. No. 245, 80th Cong., 1st Sess. 5 (1947), that the amendment would "requir[e] the Board to act only upon the weight of credible legal evidence," and it described the purpose of the amendment as follows (*id.* at 41):

"Requiring the Board to rest its rulings upon facts, not interferences [sic], conjectures, background, imponderables, and presumed expertness will correct abuses under the act.

"The bill does this, by providing in section 10(b) of the amended Labor Act that 'so far as practicable,' the new Board's proceedings shall be conducted 'in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure.'"

See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 3529 (1947) (remarks of Representative Owens).

[9] See also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5–6 (1966).

[10] 2 Weekly Compilation of Presidential Documents 895 (July 11, 1966).

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.
>
> At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. * * * A citizen must be able in confidence to complain to his Government and to provide information * * * without fear of reprisal or of being required to reveal or discuss his sources.

Congress balanced these competing interests by exempting nine categories of material from the general mandate that all identifiable records be disclosed upon request. The seventh of these exemptions, as originally enacted, protected from compulsory disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 80 Stat. 251. The legislative history indicates that this provision was to cover:

> the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court. [S. Rep. No. 813, *supra*, at 9.]

Similarly, the House report stated that Exemption 7 was intended to prevent the defendant in any crim-

inal or civil law enforcement proceeding from using the FOIA to obtain "any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, *supra*, at 11.

Since the pre-hearing release of Board witness statements under the FOIA would give a person "earlier" and "greater access" to those statements than "he would have directly" in agency proceedings, where they would not be available until after the witness had testified, the policy underlying Exemption 7 required that such statements be exempt from disclosure. Indeed, the language of Exemption 7 was amended specifically to ensure that witness statements would not be subject to pre-hearing disclosure, after Senator Humphrey objected that the original language of the bill was susceptible to an interpretation requiring disclosure of the statements of witnesses after the filing of an unfair labor practice complaint by the Board's General Counsel. 110 Cong. Rec. 17667–17668 (1964).[11]

[11] The original language of Exemption 7 exempted "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964). Senator Humphrey urged that an amendment was necessary to clarify the point that pre-hearing disclosure of Board witness statements was not intended because (110 Cong. Rec. 17667):

"Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing. While witnesses would continue to be protected in testifying at the hearing, they would enjoy no protection prior to that time. * * *"

He proposed two amendments protecting "investigatory files" and "statements of agency witnesses until such witnesses are called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination" (*ibid.*). Senator Long noted that Senator Humphrey's amendments "relate to investigatory files and an inclusion in the bill of the substance of the Jencks rule" and he proposed the language enacted as Exemption 7 to meet this "valuable suggestion" (*id.* at 17668).

Wellman Industries, Inc. v. *National Labor Relations Board*, 490 F. 2d 427 (C.A. 4), certiorari denied, 419 U.S. 834, held that Exemption 7, as enacted in 1966, protected against pre-hearing disclosure of witness statements obtained by Board agents during their investigation of unfair labor practice charges or objections to a Board-conducted election.[12] The court emphasized that, if "'an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement.'" It added that "exemption of investigatory files is necessary in order to prevent premature disclosure of an investigation so that the Board can present its strongest case in court." *Id.* at 431. Other courts similarly concluded that Exemption 7 protected Board witness statements against pre-hearing disclosure. See *Clement Brothers Co.* v. *National Labor Relations Board*,

[12] Respecting election objections, the court reasoned that "[w]hether or not resulting in an unfair labor practice charge, the Board's purpose [in resolving such objections] was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think they are 'for law enforcement purposes.'" *Wellman Industries, Inc.* v. *National Labor Relations Board*, *supra*, 490 F. 2d at 430.

282 F. Supp. 540, 542 (N.D. Ga.), approved, *National Labor Relations Board* v. *Clement Brothers Co.*, 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593–594 (D. P.R.), cited with approval, *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (C.A.D.C.), certiorari denied, 400 U.S. 824.

C. THE 1974 AMENDMENT TO EXEMPTION 7 WAS NOT INTENDED TO DEPRIVE BOARD WITNESS STATEMENTS OF THE PROTECTION AGAINST PRE-HEARING DISCLOSURE THEY PREVIOUSLY HAD

In 1974, Exemption 7 was amended, in pertinent part, to cover:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source * * *, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel * * *.

This amendment was intended to overrule a series of decisions of the District of Columbia Circuit that had interpreted Exemption 7 as protecting any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether enforcement proceedings were still contemplated, or even whether there was a legitimate need to withhold the information from the public.[13] The amendment was not intended to alter the purpose or scope of Exemption 7 as originally enacted, but rather to explicate these purposes and reject the overbroad interpretation of the District of Columbia Circuit.

Senator Hart, a sponsor of the amendment, explained:

> My reading of the legislative history [of Exemption 7 as enacted in 1966] suggests that Congress intended that this seventh exemption

[13] See *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F. 2d 370 (C.A.D.C.); *Ditlow* v. *Brinegar*, 494 F. 2d 1073 (C.A.D.C.); *Aspin* v. *Department of Defense*, 491 F. 2d 24 (C.A.D.C.); *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (C.A.D.C.), certiorari denied, 416 U.S. 993. As Senator Hart stated in the following colloquy with Senator Kennedy:

"Mr. Kennedy. * * * Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

"* * * As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

"Mr. Hart. The Senator from Massachusetts is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do."

Freedom of Information Act and Amendments of 1974 (P.L. 93–502), Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975) (hereafter "Source Book") 349.

was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have.

Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.

That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering.

* * * * *

This amendment * * * explicitly places the burden of justifying nondisclosure on the Government, which would have to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, or disclose investigative techniques or procedures.

* * * * *

Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes. [Freedom of Information Act and Amendments of 1974 (P.L. 93–502) Source Book: Legislative History, Texts, and other Documents, Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975) (hereinafter "Source Book") 332–333.]

He concluded (Source Book 334):

This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

The legislative history contains no indication that Congress intended the amendment to overrule cases such as *Wellman Industries, supra,* holding that witness statements obtained by the Board in an investigation of a particular case were exempt from disclosure under the original Exemption 7, or to enlarge the scope of discovery under the NLRA. Indeed, Senator Hart explained that the amendment would continue to bar disclosure:

First, where the production of a record would interfere with enforcement procedures. This

> would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. * * * [Source Book 333.] [14]

Since one of the original purposes of Exemption 7 was to exempt from disclosure witness statements obtained by the Board, and since interpreting the FOIA to require such disclosure would create a potent new discovery tool in Board proceedings, the inference is compelling that Congress intended the amended Exemption 7 to continue to protect the statements of witnesses in labor cases. As the Second Circuit reasoned in *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F. 2d 484, 491–492, certiorari denied, 429 U.S. 834:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have

[14] Although Senator Hart added (*ibid.*) that, "it is only relevant to make such determination in the context of the particular enforcement proceeding," he did not discuss the type of showing that would be required in the particular case, or foreclose the possibility that, as with witness affidavits in Board enforcement proceedings, interference with the law enforcement proceeding could be inferred from the nature of the documents sought in certain circumstances.

> done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. * * *

D. PRE-HEARING DISCLOSURE OF WITNESS STATEMENTS OBTAINED BY THE BOARD WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS WITHIN THE MEANING OF EXEMPTION 7(A)

In view of this background, it is not surprising that every court of appeals that has considered the question—with the sole exception of the Fifth Circuit in the instant case—has recognized that the peculiar character of labor litigation is such that pre-hearing disclosure of statements obtained from employees and their representatives in connection with unfair labor practice proceedings would necessarily "interfere with" the Board's enforcement proceedings.[15] *Title Guarantee Co.* v. *National Labor Relations Board, supra; Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d

[15] See also *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131 (C.A. 4). The Fourth Circuit held that employee statements in a Board back pay proceeding were not protected against disclosure under

145 (C.A. 1), certiorari denied, 429 U.S. 895; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board,* 538 F. 2d 80 (C.A. 3); *National Labor Relations Board* v. *Hardeman Garment Corp.,* 557 F. 2d 559 (C.A. 6); *Abrahamson Chrysler-Plymouth, Inc.* v. *National Labor Relations Board,* 561 F. 2d 63 (C.A. 7); *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board,* 550 F. 2d 1139 (C.A. 9);[16] *Climax Molyb-*

Exemption 7(A), since the "underlying unfair labor practice controversy has already been resolved, and all that remains is the largely objective task of ascertaining the amount of back pay" (*id.* at 1135). However, the court emphasized that "our denial of a 7(A) exemption is limited to back pay proceedings"; "[w]e do not depart from the sound precedent, including our own [*Wellman Industries, supra*], which exempts from disclosure investigatory records compiled for representation and unfair labor practice proceedings" (*id.* at 1136). But see *Charlotte-Mecklenberg Hospital Authority* v. *Perry,* C.A. 4, Nos. 76–2272 and 76–2273, decided January 26, 1978, in which the Fourth Circuit held that sworn statements taken by the Equal Employment Opportunity Commission (EEOC) from charging parties in connection with employment discrimination charges were not *per se* protected against disclosure under Exemption 7(A) of the FOIA, where the investigation was still open. The court in *Perry* stated that the decision in *Wellman Industries* was one of those which Congress intended to override by the 1974 amendment. The court held that the district court was required, in each case, to examine the statements *in camera* and determine whether their disclosure would interfere with enforcement proceedings. It concluded that the district court had not abused its discretion in determining, after *in camera* examination, that disclosure to the employer of the statements of present employees would interfere with the EEOC investigation, but that disclosure of the statements of former employees would not.

[16] Although the Ninth Circuit in *Harvey's* agreed that employee statements, and those of union representatives, are exempt from disclosure under FOIA Exemption 7(A) without the necessity for an *in camera* inspection, the case was remanded to the dis-

denum Co. v. *National Labor Relations Board,* 539 F. 2d 63 (C.A. 10).[17]

The courts of appeals have correctly recognized that the application of Exemption 7 to Labor Board enforcement proceedings must take account of the spe-

trict court to decide whether such inspection would be necessary to determine if statements taken from non-employees are similarly exempt. 550 F. 2d at 1143. Cf. *New England Medical Center Hospital* v. *National Labor Relations Board,* 548 F. 2d 377, 382–383 (C.A. 1).

[17] The question whether Exemption 7(A) would protect Board witness statements from disclosure after the case for which they were obtained has been closed is not presented here, nor was it presented in *Title Guarantee* or the cases following it listed above. In *Poss* v. *National Labor Relations Board,* 565 F. 2d 654, 657, the Tenth Circuit held that statements of employees and others obtained in an unfair labor practice investigation that ended in a decision not to issue a complaint were not protected against disclosure under Exemption 7(A), since "there are *no* enforcement proceedings pending, [and] none is contemplated * * *." Although the Board has not petitioned for certiorari in *Poss*, it does not agree with the Tenth Circuit's view that Exemption 7(A) protects only investigatory records in "open" cases. As the court below noted (Pet. App. A, p. 6A n. 8), despite the fact that the unjustified withholding of investigatory files pertaining to closed cases was a particularly egregious abuse of Exemption 7 which Exemption 7(A) was designed to eliminate, the latter was not drafted in terms of whether the case was open or closed, but of whether disclosure would "interfere with enforcement proceedings." See also *New England Medical Center Hospital* v. *National Labor Relations Board,* 548 F. 2d 377, 385–386 (C.A. 1). While the disclosure of Board witness statements after a case has been closed may no longer present the danger that that case would be harmed by the premature release of evidence or information not in the possession of the respondent, it still poses the danger that such disclosure would subject the persons giving the statements to employer or union reprisal and generally inhibit the flow of information to the Board in enforcement proceedings, and thus make it more difficult for the Board to conduct those proceedings.

cial character of those proceedings. The linchpin of the courts of appeals' analysis has been the reason that discovery in labor cases has been strictly limited: "the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son, Inc.* v. *National Labor Relations Board, supra,* 538 F. 2d at 83.

In *Climax Molybdenum Co.* v. *National Labor Relations Board, supra,* 539 F. 2d at 65, the court reasoned that "[t]he labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings."[18] The appellate courts have agreed with the Second Circuit's conclusion in *Title Guarantee Co., supra,* 534 F. 2d at 491, that the pre-hearing disclosure of witness statements obtained by the Board would "interfere" with pending enforcement proceedings in two ways: "first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *."

[18] In *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 91–93, the Court emphasized that *in camera* inspection of documents need not be undertaken in every case, because affidavits or even "surrounding circumstances" might be enough to show that certain documents met the requisite criteria for exemption. See also *New England Medical Center Hospital* v. *National Labor Relations Board, supra,* 548 F. 2d at 385.

The Ninth Circuit Court of Appeals accurately summed up the situation in *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board, supra,* 550 F. 2d at 1142: "[T]here can be no doubt" that pretrial disclosure of employee statements would have a "retarding effect on open and frank Board investigations of alleged unfair labor practices" that "would undermine labor policy as well as unduly broaden the scope of the FOIA."

The risk of interference with Board proceedings, though lessened to some degree, still exists where, as here, the request for pre-hearing statements is limited to those witnesses the Board intends to call at the hearing. The court of appeals acknowledged that "there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness during the five days prior to the hearing, done in an effort to silence him or dilute the nature of his testimony" (Pet. App. A, p. 14A), and it recognized that "post hoc discipline does not necessarily dissipate the anxieties of those upon whom the intimidation may be visited" (*id.* at 15A). Moreover, as the First Circuit stated in *Good-*

friend Western Corp. v. *Fuchs, supra,* 535 F. 2d at 147, in denying an FOIA request for the statements of witnesses scheduled to testify 24 hours after the order was issued: "Even in this case we cannot rule out all possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * * .'" "There is solid evidence in the legislative history that the sponsors of the 1974 amendments acknowledged the right of an investigative agency to avoid the possible harm to a prospective law enforcement proceeding that might occur through 'premature release of evidence or information not in the possession of known or potential defendants.'" *New England Medical Center Hospital* v. *National Labor Relations Board, supra,* 548 F. 2d at 382.

The court of appeals in the instant case, however, erroneously minimized the significant change its interpretation of Exemption 7(A) would have on the scope of discovery in Board enforcement proceedings. Although the court noted the explanation of the sponsor of the 1974 amendment (*supra,* pp. 29–30) that Exemption 7(A), no less than the original Exemption 7, was intended "'to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have'" (Pet. App. A, p. 7A), it nonetheless concluded that "comparative discovery is not the key to the meaning of exemption 7(A)" (*id.* at 8A). The reasons given for this conclusion do not withstand analysis.

The court first asserted that "it is questionable whether FOIA disclosure would result in an increase in discovery rights in this court" (Pet. App. A, p. 8A). This assertion, however, rests on the court's view that Section 10(b) of the NLRA requires the Board to adopt discovery procedures analogous to those provided by the Federal Rules of Civil Procedure—which, as we have shown, is erroneous and not shared by other courts of appeals (see pp. 15, 20–22, *supra*).

Second, the court mistakenly believed that the application of what it termed "the comparative discovery test" would require it to "look to the particular needs of the plaintiff (in order to see whether he has shown good cause for production)" despite the fact that the FOIA "mandates release of information 'to any person'" (Pet. App. A, p. 10A). This argument misconceives the significance of the inquiry whether disclosure under FOIA would expand discovery in Board proceedings.

We agree with the court that the relevant inquiry is not whether the special needs of a particular plaintiff would permit him to secure by discovery the documents requested under FOIA. But Congress' intention that Exemption 7 prevent litigants from gaining earlier or greater access to investigative materials under FOIA than they would otherwise have is similar to the policy expressed in Exemption 5 of the FOIA, which "withholds from a member of the public documents which a private party could not discover in litigation with the agency."[19] *National Labor Re-*

[19] The court below recognized that the analysis "under exemption 7(A)'s 'no earlier or greater access' theory" was similar to

lations Board v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148. This Court has concluded that Exemption 5 should be construed "to exempt those documents * * * normally privileged in the civil discovery context," since "it is not sensible to construe the [FOIA] to require disclosure of any documents which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." *Id.* at 149 n. 16. Exemption 7(A) should likewise be construed to protect investigative materials that would not normally be subject to pre-trial disclosure.

Since witness statements are not subject to pre-hearing disclosure in a Board proceeding, and indeed would not routinely be available even in a civil discovery context,[20] they should be protected against disclosure under FOIA Exemption 7(A) without regard to whether an individual FOIA plaintiff could or could not demonstrate good cause for disclosure.

Third, the court believed that, "[i]f the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted 'only to the extent that * * * production * * * would * * * interfere' in some way" with an enforcement proceeding (Pet. App. A, p. 10A). The court concluded (Pet. App. A, p. 10A) that it should give effect to the "spirit of the procedural reform" that brought about the amendment of Exemption 7.

Turning to an examination of the ways in which pre-trial disclosure of witness statements might interfere with Board enforcement proceedings, the court rejected what it termed (*id.* at 14A) a "sweeping assumption of intimidation"—at least where the FOIA request was limited to the statements of persons who were to be called as witnesses. The court acknowledged (*ibid.*, footnote omitted) the "risk of interference * * * in the form of witness intimidation from harassment of an employee-witness * * * prior to the hearing, done in an effort to silence him or dilute the nature of his testimony," but it concluded that to invoke the exemption the Board must introduce evidence showing the likelihood that such intimidation would occur in the particular proceeding.[21]

As we have shown, however, the legislative history contains no support for the notion that the "reform" of Exemption 7 was intended to require pre-hearing disclosure of witness statements in Board enforcement proceedings. The court's requirement that there be

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that "under exemption 5's express test of 'not * * * available by law to a party * * * in litigation with the agency'" (Pet. App. A, p. 9A n. 15). As discussed *infra*, pp. 44–50, we also contend that the statements are protected by Exemption 5.

[20] Under Rule 26 of the Federal Rules of Civil Procedure, witness statements obtained in preparation of litigation are part of an attorney's work product and would not be producible except on a showing of special need. See discussion, *infra*, pp. 46–48.

[21] The court indicated that the following factors, *inter alia*, would be relevant to such a showing: "whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give" (Pet. App. A, p. 16A).

specific evidence of the likelihood of intimidation is both unrealistic and unworkable. In the Board's judgment, it would be unable to sustain this burden of proof in many cases, since intimidation (and its likely prospect) "may be subtle and not susceptible of proof." *National Labor Relations Board* v. *Hardeman Garment Corp.*, 557 F. 2d 559, 562 n. 8 (C.A. 6). In other cases, meeting this burden might require the Board to reveal so much of the evidence developed in its unfair labor practice investigation that, even if the district court were ultimately to rule that the statements could be withheld, the victory would be a Pyrrhic one.

Moreover, determining on a case-by-case basis whether disclosure of a particular statement would interfere with Board enforcement proceedings is a task for which, as the Tenth Circuit correctly noted, the courts are "ill-fitted." *Climax Molybdenum Co.* v. *National Labor Relations Board, supra*, 539 F. 2d at 65.[22] As the First Circuit recognized in *New England*

[22] The district courts have applied the standard enunciated by the court below as follows:

In *Delchamps, Inc.* v. *National Labor Relations Board*, Civil Action No. 78–21–H (S.D. Ala.), January 19, 1978, 97 LRRM 2583, the district court ordered the Board to disclose the statements of witnesses prior to an unfair labor practice hearing on the ground that "any intimidation the plaintiff might wish to impose could have been, or already has been, done" (*id.* at 2584). In *JTM Corporation* v. *National Labor Relations Board*, Civil Action No. 77–166–COL (M.D. Ga.), preliminary injunction issued December 27, 1977, on appeal, No. 78–1097 (C.A. 5), the employer was held to have established likelihood of success on the merits of its FOIA action because the Board did not contend, in a hearing on a preliminary injunction, that the employer had already discriminated against employees for giving information to the Board. In *Han-Dee Pak, Inc.* v. *National Labor Relations Board*, Civil Action No. C–77–2069–A (N.D. Ga.), decided January 4, 1978, notice of appeal filed January 18, 1978 (C.A. 5), evidence regarding prior unfair labor practices committed by the employer was held insufficient to establish that intimidation of witnesses was likely to result from pre-hearing disclosure of their statements in the present unfair labor practice proceeding.

Medical Center Hospital v. *National Labor Relations Board, supra*, 548 F. 2d at 384:

> The specter of involvement of the district court in discovery matters during an ongoing unfair labor practice proceeding, with lengthy stays while the district court (and court of appeals) review the Board's file, is a compelling reason to construe Exemption 7(A) to shelter investigatory records in the Board's case file prior to the time that foreseeable administrative and judicial proceedings are completed. Any other approach could trap the Board into foregoing all claims to exemptions under FOIA if it is not to accept crippling delays in the prosecution of unfair practice cases while litigating the exemptions in court.

The Board's experience in this and other cases confirms the validity of the latter point. Here the Board was faced with the choice of either turning over the witness statements to the Company and exposing its witnesses to the risk of harassment and reprisal, or delaying its hearing in the underlying unfair labor practice case until the Company's FOIA suit was finally adjudicated; because the Board

elected the latter course, the unfair labor practice hearing has been delayed almost two years.

Moreover, in those cases where the Board, pending a resolution of the issue by this Court, has attempted to make the particularized showing of harm required by the decision of the court below, the Board's efforts have been hampered by the fact that FOIA suits are usually instituted only shortly before the scheduled unfair labor practice hearing and injunctive relief is usually requested to insure disclosure prior to the hearing. Despite the Fifth Circuit's statement that it "need not decide whether or when a district court adjudicating a FOIA claim may enjoin ongoing or prospective NLRB proceedings"[23] (Pet. App. A, pp. 2A–3A), district courts faced with this situation have granted preliminary injunctions, thus delaying Board proceedings pending a decision of the merits of the FOIA claim,[24] or have severely limited the Board's opportunity to prepare its defense to the FOIA complaint.[25] In these circumstances, even if the Board were able to satisfy the test of the court below, it could do so only at the expense of sub-

[23] See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1.

[24] See *JTM Corporation* v. *National Labor Relations Board*, *supra; Clements Wire & Manufacturing Company, Inc.* v. *National Labor Relations Board*, Civil Action No. S78–0002 (C) (S.D. Miss.), preliminary injunction issued January 6, 1978, on appeal, No. 78–1296 (C.A. 5); *Enterprise Products Company* v. *National Labor Relations Board*, Civil Action No. 78–278, Sec. C (G) (E.D. La.), preliminary injunction issued February 1, 1978.

[25] See, for example, *Han-Dee Pak, Inc.* v. *National Labor Relations Board*, *supra*, where the company filed a complaint in district court on December 30, 1977, requesting statements of witnesses to be called by the General Counsel in an unfair labor practice hearing scheduled for January 9, 1978. The court ordered the Board to present all evidence at a hearing on January 4, 1978, and, after such restricted presentation, ruled that the Board had failed to meet its burden of proof and ordered release of the statements on January 5, 1978, or at least four days before any hearing at which the witnesses would be called. See also, *Procter & Gamble Manufacturing Company* v. *National Labor Relations Board*, Civil Action No. C.A. 3–78–0149–P (N.D. Tex.), decided February 10, 1978.

jecting its unfair labor practice cases to "crippling delays" (*supra,* pp. 41–42). Such a result is at odds with this Court's recognition that "exemptions to disclosure under the Act were intended to be practical workable concepts." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 381–382.

In sum, the result of the decision of the court of appeals below is the unwarranted transformation of the FOIA into a new and potent discovery tool in Board enforcement proceedings, despite this Court's recognition that the FOIA was designed to inform the public about agency action, and not to authorize discovery or otherwise benefit private litigants. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10. As shown, *supra*, pp. 26–31, in amending Exemption 7 in 1974, Congress did not intend to effect such a drastic and deleterious change. There is no indication that when Congress provided an exemption for law enforcement records, the disclosure of which would "interfere with enforcement proceedings," it meant

to require an agency always to produce evidence of the effect of disclosure on the particular enforcement proceeding involved, and to preclude the agency from making a showing, based on its cumulative experience, that disclosure of certain categories of material would interfere with its enforcement proceedings.

II. EXEMPTION 5 OF THE FOIA PROTECTS BOARD WITNESS STATEMENTS FROM PRE-HEARING DISCLOSURE

Exemption 5 of the FOIA, which the 1974 amendments did not change, exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

This exemption "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context * * * ." *Renegotiation Board* v. *Grumman Engineering Aircraft Corp.*, 421 U.S. 168, 184. The exemption extends to "those documents * * * normally privileged in the civil discovery context." *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149. Thus, the relevant consideration is not whether a document would be discoverable in "litigation in which the private party's claim is the most compelling," but rather whether the document "would 'routinely be disclosed' in private litigation." *Id.* at 149 n. 16, citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Among the privileges which "Congress had * * * specifically in mind in adopting Exemption 5" are "the Government's executive privilege" and "the attorney's work-product privilege" *National Labor Relations Board* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 150, 154. The Senate Report on the FOIA stated that this exemption would include "the working papers of the agency attorney." S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).

As detailed in *National Labor Relations Board* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 138–141, unfair labor practice charges are filed in the first instance with the Board's Regional Office, where they are investigated by a member of the Regional Office staff, who usually will interview witnesses and take statements from them. If, on the basis of the investigation the Regional Director believes the charge has merit, a complaint will issue, unless there is a settlement.

If in the Regional Director's judgment the charge has no merit, the charging party will be advised of this determination and of his right to appeal to the General Counsel in Washington, D.C. If the charging party exercises this right, the entire file in the possession of the Regional Director will be sent to the General Counsel's Office in Washington, D.C. Based upon a review of this file, and such additional information as may be appropriate, the General Counsel will either sustain the Regional Director's ruling or direct that a complaint be issued.

The statements obtained from witnesses during the investigation conducted by the Regional Office serve two related and essential functions. (1) They are the basis upon which agency officials can evaluate the allegations in the charge and determine whether or not

sufficient evidence is likely to be adduced at a hearing to establish a violation. Without such statements, it would be virtually impossible for the Regional Director to make a reasoned judgment whether or not to issue a complaint. These statements also provide the basis for the General Counsel to review the Regional Director's determination not to issue a complaint when an appeal is taken from that ruling. (2) After a complaint is issued, the statements are used by the agency attorney handling the case to prepare for trial. As discussed in Point I, *supra,* the Board's rules make no provision for pre-hearing disclosure of these statements because of the potential for witness harassment and intimidation, and the danger that the respondent will learn the Board's case in advance and frustrate the proceedings or construct defenses.

As the court below acknowledged (Pet. App. A, p. 21A), the witness statements the Company requested in this case fall within the work product privilege, as defined in *Hickman* v. *Taylor,* 329 U.S. 495,[26] because

[26] In *Hickman*, the plaintiff sought the production of all written statements of witnesses obtained by respondents' counsel, as well as accounts of any oral statements made by such witnesses and any memoranda relating thereto. 329 U.S. at 499–500. The Court concluded that, while such material was not protected by the attorney-client privilege, it was not automatically subject to discovery:

"Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.

"Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed * * * the 'work product of the lawyer'." (329 U.S. at 510–511.)

The Court noted that this did not mean that "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511. "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized * * * that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production * * *." *Id.* at 512. The Court added, however, that rarely, if ever, would there be adequate justification for requiring disclosure of oral statements made by witnesses to an attorney, "whether presently in the form of his mental impressions or memoranda." *Ibid.*

[27] As this Court recognized in *United States* v. *Nobles*, 422 U.S. 225, 238–239 (footnote omitted), the attorney work product privilege—"is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for

they are documents prepared in anticipation of litigation, either by attorneys or those working with them.[27]

Accordingly, if the full privilege recognized in *Hickman* [28] is incorporated into Exemption 5, the statements fall within the protection of the exemption.

The court of appeals, concluding that "the purpose of Exemption 5 was to protect agency deliberative processes," held that "purely factual material such as verbatim witness statements must not fall within it" (Pet. App. A, p. 22A).[29] The court based its conclusion upon this Court's holding in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, that the executive privilege incorporated into Exemption 5 does not protect purely factual material from disclosure.

trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."

The statements obtained by Board investigators to assist Board attorneys are subject to the work product privilege. See *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F. 2d 223, 233–234 (C.A. 5), certiorari denied, 414 U.S. 822; *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co.*, 185 F. 2d 285, 289–290 (C.A. 2), certiorari denied, 342 U.S. 812.

[28] Rule 26(b)(3) of the Federal Rules of Civil Procedure, as adopted in 1970, incorporates the work product privilege recognized in *Hickman*. It provides, in relevant part, that: "a party may obtain discovery of documents and tangible things * * * prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

[29] A similar interpretation of Exemption 5 has been adopted by two other courts of appeals. *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1137–1138 (C.A. 4); *Poss* v. *National Labor Relations Board*, 565 F. 2d 654, 659 (C.A. 10).

The premise of the Court's analysis in *Mink* was its discussion of the "finite limits" of the doctrine of executive privilege, and its conclusion that—in the absence of a claim of state secrets—purely factual material would be available for discovery by private parties in litigation with the government. *Id.* at 87–88. The Court reasoned that since the purpose of executive privilege is to encourage frank discussion of legal and policy matters among agency personnel by shielding such deliberations from public scrutiny, materials reflecting deliberative or policymaking processes stand on a different footing than purely factual material, because disclosure of the latter would not ordinarily reveal the deliberative process.

This reasoning is not, however, applicable to the attorney work product privilege, which is not limited to materials reflecting an attorney's deliberative processes, but protects an attorney's entire course of preparation, including "interviews, [witnesses'] statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." *Hickman* v. *Taylor, supra,* 329 U.S. at 510–512. See also *In re Murphy,* 560 F. 2d 326, 333–335 (C.A. 8); *In re Natta,* 410 F. 2d 187, 193 (C.A. 3), certiorari denied *sub nom. Montecatini Edison S.p.A.* v. *E. I. duPont de Nemours & Co.,* 396 U.S. 836. Since disclosure of factual material in an attorney's files would violate the protected status of these files no less than would the disclosure of deliberative material therein, the

work product privilege, unlike executive privilege, protects both types of material.[30] Cf. *Brockway* v. *Department of Air Force*, 518 F. 2d 1184, 1192–1193 (C.A. 8).[31]

Accordingly, since the attorney work product privilege is not inherently limited to materials reflecting deliberative processes, but by definition encompasses all materials—including witnesses' statements—obtained by an attorney in advance of litigation, the court of appeals erred in holding that these statements were not within Exemption 5.

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[30] Although under Rule 26(b)(3) of the Federal Rules of Civil Procedure (n. 28, *supra*), an attorney's mental impressions are entitled to an absolute privilege against disclosure whereas factual material gathered by him is entitled only to a qualified privilege, this distinction is irrelevant for purposes of construing the scope of Exemption 5 of the FOIA (see *supra*, p. 44).

[31] In that case, the Eighth Circuit held that Exemption 5 covers witness statements furnished to the Air Force safety investigation board, even though they were not policy memoranda. The court found that there was a "qualified executive privilege" for such statements. 518 F. 2d at 1191–1192. Moreover, the court concluded that the "'factual versus deliberative distinction is inadequate to resolve the difficult question whether * * *' * * * witness statements should be protected by Exemption 5"; rather, "it is more appropriate to view the claim of government or executive privilege from the perspective of the purposes and goals of the FOIA and this specific exemption." *Id.* at 1192. Applying this test, the court found that the FOIA's policy of not inhibiting the free flow of information and free discussion within the agency "will be thwarted by the disclosure of these witness statements," while "the nondisclosure of the witness statements will have no great bearing" on the FOIA's policy of disseminating useful information to the public. For "without the assurances of confidentiality the information probably would not come to light at all and would be lost not only to any individual seeking the information, but also to the Air Force seeking improvement in safety procedures." *Id.* at 1193.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF RESPONDENT ROBBINS TIRE AND RUBBER COMPANY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF RESPONDENT ROBBINS TIRE AND RUBBER COMPANY

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals may be found in the Appendix ("A.") beginning at Page 108 and is reported at 563 F.2d 724 (1977). The Order of a separate panel of the Fifth Circuit denying Petitioner's emergency motion is found at A. 107. The Memorandum of Decision of the District Court (N.D. Ala.) is found at A. 57 and reported at 92 L.R.R.M. 2586 (1976).

STATUTES INVOLVED

Supplementing the statutory section of Petitioner's brief ("Pet. Br."), the Freedom of Information

Act (FOIA), as amended, 5 U.S.C. 552 also states at § (c):

> (c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Prior to its amendment the FOIA of 1966 (P.L. 90-23, 81 Stat. 54) 5 U.S.C. 552 (Public Information; agency rules, opinions, orders, records and proceedings) stated:

> (b) This section does not apply to matters that are —
>
> (7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> * * *

QUESTION FOR REVIEW

In accordance with the 5 U.S.C. 552 (a) (4) (B) statutory provisions placing the burden of proof on the Board, providing for a *de novo* determination by the district court, and permitting an *in camera* examination by the court, may the Board withhold all the requested public information[1] under FOIA ex-

[1] Requested under 5 U.S.C. § 552(a) (3) were that "copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)." (A. 37).

emptions 5 U.S.C. 552(b)(5) and (7)(A) where at the district court hearing on the merits, the Board failed to offer any proof (affidavits, testimony, or otherwise) and did not even submit the requested information to the court for *in camera* examination.

COUNTERSTATEMENT OF THE CASE

This matter arose from the Board's categorical refusal to permit Respondent the right under 5 U.S.C. 552(a)(3) of the amended FOIA to inspect and, if necessary, copy information contained in Board investigatory case files.

A. BACKGROUND

The Board had conducted a secret ballot election among Respondent's bargaining unit employees concerning their representation by a union[2] (A. 11). The union lost the election and filed objections to the election in an effort to get another election. Pursuant to 29 C.F.R. 102.69, the Board's Regional Director conducted an investigation of the objections. During this investigation Respondent cooperated fully with the Board, permitting the Board's field examiner to interview its witnesses, review and copy documentary evidence, and to take sworn statements from Respondent's witnesses. As a result of the investigation five of the eleven objections were withdrawn, and one was overruled (A. 13, 20). The Regional Director concluded the remaining objections "raise credibility

[2] The union was the Aluminum Workers International Union, AFL-CIO.

issues which may best be resolved by record testimony at a hearing" (A. 22).

No unfair labor practice charges were filed by the union. However, on February 4, 1976, an individual, Gene E. Newton, filed an unfair labor practice charge[3] against Respondent alleging violation of Sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. 158(a)(1) and (3) (A. 26). During investigation of this charge, Respondent cooperated with the Board. The Regional Director concluded as a result of the investigation not to go forward with the Section 8(a)(3) portion of the charge regarding charging party Newton. Accordingly, the charge on March 3, 1976 was amended to only include the 8(a)(1) allegations (A.26). As the remaining 8(a)(1) allegations were largely duplicative of the objections which raised credibility issues the Regional Director issued a complaint and notice of hearing on March 26, 1976 (A. 28).

B. FOIA REQUEST TO BOARD

Inasmuch as the Board's investigation was then complete, Respondent immediately upon the March 31, 1976 receipt of the Board's complaint and notice of hearing, hand delivered to the Board's Regional Office an appropriate request for information under the amended FOIA (A. 37). By letter dated April 2, 1976, the Acting Regional Director of the Board's Tenth Region denied *in toto* Respondent's request, citing FOIA exemptions 5, 7(A), 7(C) and 7(D) (A. 39).

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[3] There is no evidence Respondent has ever been found guilty of committing any unfair labor practices.

Respondent promptly appealed to the Board's General Counsel noting the Acting Regional Director's general denial had not given specific consideration to the particular documents requested and had failed to show why portions of the requested documents were not segregable[4] and disclosable (A. 43). The Board's General Counsel by letter of April 15, 1976 denied Respondent's intra-agency appeal "substantially for the reasons set forth in the Regional Director's[5] letter of April 2, 1976." The General Counsel went on to state "Inasmuch as the purpose of the FOIA was not intended to be for discovery of our file contents, and noting the Board's Rules do not provide for discovery of any of the information you seek, the request must be denied." (Petition for Certiorari, App. E, p. 37A). The General Counsel continued "Finally, with respect to this Agency's refusal to 'sanitize' the requested information, it is our belief that such an undertaking would be impractical since it is impossible to determine exactly what part of the information would need to be deleted in order to protect our enforcement proceedings, any privacy privileges or our confidential sources." (*Id.*, p. 38A).

---

[4] The 1974 amendments to the FOIA added the requirement qualifying the exceptions:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." (5 U.S.C. 552 (b)).

This was omitted from the Pet. Br. p. 4.

[5] Even though Respondent's request was limited in time and scope of disclosure it was accorded only a rubber stamp handling as is shown by the "canned" referral to the "Regional Director's letter" when here the *Acting* Regional Director responded (A. 39).

C. DISTRICT COURT'S DE NOVO DETERMINATION

After telephoning the General Counsel's office on April 9 and 12, 1976, concerning the possibility of Respondent having to file a suit in District Court to obtain the requested information and being informed on April 12, 1976 by General Counsel's office such request would not be granted (A. 48, 49), Respondent filed on April 15, 1976 its action under the amended FOIA seeking the requested information (A. 1, 3-49). Petitioner then filed a written motion to dismiss the action or in the alternative for summary judgment (A. 50). In support of its position, the Board filed an opposition brief (A. 49-58). This brief and the Board's oral argument[6] focused almost exclusively on the 7(A) exemption and whether the Court could enjoin the Board under the amended FOIA.

During the District Court hearing on the merits the Court asked the Board's counsel if the Board had "anything by way of evidence that they desire to offer?" (A. 71). The counsel for the General Counsel responded "No, Your Honor" (A. 71). Later in the hearing the Court reminded the Board's counsel the burden of establishing an exemption rested upon the NLRB. The Court then inquired if there was anything unique about the statements or unusual that would cause them to interfere with the enforcement proceeding or whether the Board's position was that as

[6] During the course of the hearing the counsel for the General Counsel furnished the Court with a copy of the Second Circuit's *Title Guarantee* decision (534 F.2d 484, *certiorari denied*, 429 U.S. 834) and suggested *Title Guarantee* was "dispositive of the issue" (A. 77).

a general proposition the giving of virtually any statement would interfere. Counsel for the General Counsel said he would have to accept the latter description as there was nothing unique in Board proceedings in these statements. The Court then asked the Board's counsel if he was then taking the position he didn't need to go forward and make a showing that these particular statements would interfere, that these were just normal statements and that these like any other statements would interfere. Counsel for the General Counsel replied, "Yes, Your Honor, Yes" (A. 91).

The Board offered no evidence of any sort — no affidavits, no oral testimony, no documents, no evidence whatsoever. Neither did the Board at any time submit the requested information to the Court for an *in camera* examination, nor did it describe the information as having a deliberative quality. The Court then took the matter under advisement (A. 59).

On April 16, 1976, the Court issued its Order and Memorandum of Decision (A. 57-65 and which is reported at 92 LRRM 2586) finding[7] the Board had "not demonstrated how the delivery to (Respondent) several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceedings of the Board where in connection with those proceedings, the Board by its own rules will be required to give the statements and affidavits to (Respondent)" (A. 64). The Board was then ordered to disclose the requested information (A. 65).

[7] The Court also noted ". . . the *fact* of disclosure of the statements is not the issue but simply the *time* at which the disclosure will be made" (A. 64; emphasis original).

D. THE BOARD'S APPEALS

On April 20, 1976 the Board filed with the Fifth Circuit an emergency motion for stay pending appeal (A. 96). Cited therein was *Beverly v. U. S.*, 468 F.2d 732 (C.A. 5, 1972)[8] which listed as one of four factors, "the likelihood of his prevailing on the merits on appeal." (*Beverly*, pp. 740, 741) Respondent on April 22, 1976 filed its response to the Board's motion (A. 99). On April 26, 1976, the Fifth Circuit[9] denied the Board's motion.

Subsequently the Fifth Circuit heard oral arguments from both the Board and Respondent and issued its opinion on November 21, 1977 (A. 108 and which is reported at 563 F.2d 724), affirming the District Court. In its decision the Fifth Circuit reviewed the facts of this particular case in light of the legislative history of the FOIA and its amendments. The Fifth Circuit also looked to this Court's opinions in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974); *EPA v. Mink*, 410 U.S. 73 (1973); *Hickman v. Taylor*, 329 U.S. 495 (1947), as well as to the varied decisions of the other circuits and to leading law reviews and treatises in this area. The Fifth Circuit concluded the Board had failed to sustain its statutory burden of proof as to exemptions 7(A),

[8] The Board noted this Court cited *Beverly* with approval in *In re Permian Basis Area Rate Cases*, 390 U.S. 747 (1968).

[9] The Fifth Circuit panel which denied the Board's motion was completely different from the panel deciding the case in chief. Both panels ruled unanimously against the Board's position.

7(C), 7(D) and 5. Accordingly, it affirmed the District Court's order compelling disclosure (A. 129).

SUMMARY OF ARGUMENT

I

An agency's internal and restrictive regulations do *not* supersede federal statutes requiring liberal disclosure of requested information in agency hands. Congress left no doubt in passing the 1974 amendments to FOIA there was to be more complete disclosure of information in investigatory files. Any and all investigative information is *prima facie* disclosable unless the withholding agency sustains its burden of proof in the *de novo* district court hearing such requested information relating to a particular enforcement proceeding is exempt. In the case *sub judice* no evidence of any sort was presented to the District Court nor were the particular statements requested offered for *in camera* examination by the Court. The Board categorically, without any proof, withheld the requested information.

A. The legislative history of the 1974 FOIA amendments is replete with evidence of Congress' intent to eliminate bureaucratic delays and categorical excuses for withholding information from the public. Gone are the blanket exemptions of the 1966 FOIA. No longer will agency rubber stamps and investigatory file categories shield investigative information. The agency must even disclose segregable portions of requested information. The *particular* documents requested are to be considered. Disclosure determinations based on *types*

of documents (e.g. "typical Board statements") are contrary to the amended FOIA with its burden of proof, *de novo* hearing, and *in camera* examination provisions.

B. Section (a) (4) (B) of the amended FOIA unequivocally places the burden of proof on the withholding agency. In overriding a Presidential veto and in spite of Congressional efforts to the contrary, Congress dictated there would be *no* presumption in favor of an agency determination to withhold, but that the agency must prove by testimony or affidavits in a *de novo* district court hearing the *particular* requested information may be withheld. In establishing these agency requirements Congress was keenly aware of the Board's present argument that sustaining the burden of proof of interference might be difficult.

C. With regard to "the particular enforcement proceeding" as Senator Hart stated regarding his exemption 7 amendment in 1974, the Board has offered no evidence whatsoever. Nor does the Board have any statutory presumptions regarding whether disclosure of requested information "*would* interfere." Such determination can only be made on the basis of evidence and not on the basis of internal agency assumptions which have proven not to be valid. Disclosure of the particular documents as requested in this case would not interfere with the Board enforcement proceedings.

The requested information would even be disclosed a few days later under the Board's own

rules. Knowledge of information in investigative witness statements has not interfered with Board proceedings as shown by the low priority the Board gives to 8(a) (4) cases, by the fact 8(a) (4) cases constituted only 3.1% of unfair labor practice charges against employers, and by the Board's recent Memorandum (Resp. App. B) admitting its disclosure rules were too restrictive in certain proceedings. Empirical studies, resisted by the Board, further expose the hollow facade of the Board's "interference" contention.

The Fourth Circuit in *Hospital Authority v. Perry*, ... F.2d ...., 16 FEP 68 (January 26, 1978), a case involving requested investigative affidavits from the E.E.O.C., has now joined the Fifth Circuit in rejecting *Title Guarantee's per se* approach in favor of a factual determination by the district court on a case-by-case basis. The *Title Guarantee* decision confused the Board's internal discovery limitations with the amended FOIA's separate disclosure requirements.

II.

Before the District Court the Board did not argue the requested statements were "memorandums" or "letters" within the meaning of exemption 5. Neither did the Board assert the statements were deliberative as opposed to factual documents. Moreover no evidence whatsoever was offered to sustain the Board's burden of proof in withholding requested information under exemption 5. The Tenth Circuit in *Poss v. N.L.R.B.*, 565 F.2d 654 (1977), found exemption 5 "clearly

inapplicable" to a request concerning investigative witness statements.

A. This Court in *Sears*, 421 U.S. 132 (1975), and *Mink*, 410 U.S. 73 (1973), recognized Congressional intent in enacting exemption 5 was to apply a factual versus deliberative approach to protect the governmental decision making process. Purely factual, investigative material may not be withheld under exemption 5.

B. The Board has inconsistently claimed exemption 5 and the included "work-product" aspect of exemption 5 as a defense to disclosure of witness statements. Even where the exemption 5 work-product claim has been made it has not been accepted by the Courts. Moreover the Board's internal guidelines for use of the exemption 5 argument have *not* recommended exemption 5 be used to defend against disclosure of witness statements. The "work-product" aspect of exemption 5 is protected by a consistent factual/deliberative interpretation which would exempt "the mental impressions, conclusions, opinions or legal theories of the attorney." The requested statements do not have this deliberative aspect and must be disclosed.

ARGUMENT

I. WHERE, UNDER THE AMENDED EXEMPTION 7(A) OF THE FOIA THE BOARD HAS NOT PROVED PRODUCTION OF THE REQUESTED INFORMATION WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS, THE BOARD MUST MAKE AVAILABLE THE REQUESTED INFORMATION.

An agency's internal regulations and unsubstantiated inferences clearly do not supersede federal statutes. Yet in the case *sub judice* this is precisely what the NLRB seeks to accomplish. It is uncontroverted by the Board that through its own, internally generated Rules and Regulations, it has historically denied access to information contained in the Board's investigative files (Resp. App. A). Congress in the 1974 FOIA amendments (Public Law 93-502, 93rd Congress, H.R. 12471 — November 21, 1974) opened agency investigatory files to the public. Records in these investigatory files were to be promptly made available to the public upon proper request. If the agency refused, as here, the agency in a *de novo* district court hearing had the burden of proving the withheld records were specifically exempted (5 U.S.C. 552(a)(4)(B). The Board here did not produce *any* evidence to meet its burden of proof. Neither were the requested records offered for *in camera* inspection by the Court. Instead the Board took a *per se* approach to non-disclosure of the requested information. This of course is contrary to the amended FOIA.

A. THERE ARE NO INVESTIGATORY RECORDS WHICH HAVE A PER SE EXEMPTION UNDER THE AMENDED FOIA.

"You may lead me to the trough but you can't make me drink" has been and is in many instances the attitude of government agencies when faced with directives from the legislative and judicial branches of our Government. Representative Alexander (Arkansas) in the House vote (October 7, 1974) approving the Conference Report, stated in support of the 1974 FOIA amendments:

> Since the enactment of the first housekeeping statutes under George Washington for the purpose of allowing department heads to adopt regulations governing the custody, use and preservation of Official Government documents, the executive branch has become more and more effective in twisting these laws into an excuse for hiding information and documents from the American people.
>
> Why do we have this secrecy in Government? In many instances, it appears that it is simpler for our Government officials to have a "secret" stamp on hand than to go to the trouble of digging up the information to answer a lot of questions. This same "secret" stamp makes it easier to hide errors of judgment and the favors of politics which could be damaging to the men in control.
>
> Things have not improved much over the years, I am afraid, even though the passage of the 1967 Freedom of Information Act was a giant

> step in returning to the public access to their own public documents.
>
> (Source Book, p. 386)[10]

Representative Alexander related some of his personal experiences fighting for information guarded by agency regulation. He described one request to the Department of Justice for investigative information:

> In each case, I was told that the information I requested was either not available or that it could not be made available to me. I was told that the FBI could not release the details of the investigation and that we must rely on the FBI's judgment that there had not been any illegal activities connected with the sale.
>
> The investigations were secret, but it was no secret that bread prices were higher and the American people were not ready to accept such a decision from the FBI *without having access to the facts* that would back up such a judgment.
>
> As long as a man is informed, he can usually take action to insure that his other rights are not violated. If I, as a Member of Congress and the Government Operations Committee, who works daily with the bureaucracy, become frustrated when I am denied access to information vital to the public welfare, what about John Q. Citizen and his efforts to get the information he needs?

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[10] Source Book: Freedom of Information Act and Amendments of 1974, Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975).

* * *

The enactment of these amendments to the Freedom of Information Act will put an end to the ridiculous delays, excuses, and bureaucratic runarounds which have denied U. S. citizens their "right to know" and made Americans a captive of their own Government.

(Source Book, pp. 387, 388: emphasis added)

Senator Kennedy (Massachusetts), the leading proponent of the 1974 FOIA amendments, urged adoption during the Senate's May 30, 1974 consideration of the FOIA amendments. Senator Kennedy stated:

The Supreme Court of the United States observed a few years ago that:

"It is now well established that the Constitution protects the right to receive information and ideas."

Continued the Court,

"This right to receive information and ideas is fundamental for our free society."

An important objective behind the Freedom of Information Act, passed by Congress in 1966, is to give concrete meaning to one aspect of this right to receive information — the right to receive information from the Federal Government. This is no meager right. The processes of Government touch almost every aspect of our lives, every day. From the food we eat to the cars we drive to the air we breathe; Federal agencies constantly

monitor and regulate and control. Our Government is the biggest buyer and the biggest spender in the world. It taxes and subsidizes and enforces. And it generates tons of paperwork as it goes about its business.

The Freedom of Information Act guarantees citizen access to Government information and provides the key for unlocking the doors to a vast storeroom of information. The protections of the Act thus become protections for the public's right to receive information and ideas. And the accomplishments of the act become fuller implementation of the first amendment of the Constitution.

There is another significant purpose behind the Freedom of Information Act, perhaps best stated by Justice Brandeis when he wrote:

"Publicity is justly commendable as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant, and electric light the most effective policeman."

Chief Justice Warren echoed this recently when he said that secrecy "is the incubator for corruption." We have seen too much secrecy in the past few years, and the American people are tired of it

* * *

Finally, the Freedom of Information Act is basic to the maintenance of our democratic form of government. President Johnson said on signing the FOIA that —

> "A democracy works best when the people have all the information that the security of the nation permits."
>
> The people can judge public officials better by knowing what they are doing, rather than only by listening to what they say.
>
> (Source Book, pp. 284, 285)

— and what the Board here is saying, is inconsistent with Congressional intent which was so strong it overrode a Presidential veto.[11] Congress was determined that an agency's self-designated categories, conclusions and presumptions not be used to withhold requested information. No longer would rubber stamp refusals of records marked "SECRET," "CONFIDENTIAL," or "INVESTIGATORY FILE" shield information from disclosure. Congress amended out the agency's categorical denial of files and required review of each requested record, even to the point of requiring disclosure of just portions of records.[12]

On November 2, 1977, Representative Brooks (Texas), Chairman of the Governmental Information and Individual Rights Subcommittee, submitted its

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[11] The House voted 371 to 31 and the Senate voted 65 to 27 to override the veto (Source Book, pp. 431, 480).

[12] Added to the amended exemptions was the requirement that

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

report[13] based on its study of the FOIA and Privacy Acts. The Report at page 13 stated regarding exemption 7:

> Exemption (b)(7): Investigatory files
>
> * * *
>
> The original provision concerning investigatory files was interpreted by the courts to include almost any file which could be labeled "investigatory" in nature. However, the 1974 amendments to the act narrowed the exemption by providing that investigatory records could be withheld only if their release would result in one or more of six specific harms (listed above). The amendments also changed the language of the provision to cover investigatory "records" rather than investigatory "files." The fact that a particular record is an investigatory file does not mean that it is automatically exempt. Each document or part of each document in the file must now be examined to determine whether its disclosure would result in one or more of the six enumerated harms. Moreover, these portions that do not fall within any of these categories must be released.

This new approach of examining a particular requested document in an investigatory file is firmly supported by the legislative history of the 1974 FOIA

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[13] A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents; Report 95-793 (Nov. 2, 1977), 95th Cong., 1st Sess. (G.P.O. 1977). This Report (pages 5 and 6 therein) contains a review of the Legislative Background of the FOIA from 1958 to the present. (Resp. App. C)

amendments. Senator Kennedy, during the Senate's May 30, 1974 consideration of the FOIA amendments, stated:

> Now I would like to turn to another important feature of S. 2543, which is reflected in two provisions of the bill. That is the strong statement against commingling of exempt with nonexempt materials in order to prevent disclosure of the latter, and against withholding records where deletions would as well serve the purposes of the exemption under which they are withheld. Section 552(a)(4)(B)(i) provides that the court shall in Freedom of Information Act actions "consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

Furthermore, a new sentence is added to section 552(b) stating:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section."

Taken together these provisions are intended to require agencies, and courts, to look at the information requested — not the title of the document or restricted-access stamp or the fact that the record is in a file marked "Confidential" or

"Investigation" — to determine whether the information should be released under the Freedom of Information Act.

When I originally introduced S. 2543 in October 1973, the new sentence added to section 552(b) would have read as follows:

> "If the deletions of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions."

During subcommittee consideration of the legislation it became clear that it would be desirable to apply this deletion principle to other exemptions. For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Deletion of formulas or statistics or figures may also in many cases entirely fulfill the purpose of the fourth exemption, designed to protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Thus the objectives and purposes of these exemptions, as well as of exemptions (1) and (7), could equally be served by

selective deletions while the basic document or record or file could otherwise be made available to the public.

It is upon this background that the new language in the Freedom of Information Act must be read. The Association of the Bar of the City of New York, in its recent report on freedom of information legislation, indicated its conclusion that the deletion or "savings clause" is "in its original form one of the most significant proposed amendments of the FOIA. It seems very important," stated the association, "that this deletion concept be expanded to cover other reasons for nondisclosure and all exemptions." This is precisely what we had in mind, Mr. President, in amending the original language. As stated in the committee report, page 32:

> "The amended language is intended to encompass the scope of this original proposal but to apply the deletion principle to all exemptions."

With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn against Rosen, requiring the Government to sustain its

burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act.

This new requirement is also consistent with most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new language in S. 2543 should extend this deletion principle to all cases, involving all exemptions. As one court observed, "It is a violation of the act to withhold documents on the ground that parts are exempt and parts nonexempt." "Suitable deletion may be made," said the court. In another case the court found that the legislative history of the Freedom of Information Act "does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information." And another court said that "identifying details or secret matters can be deleted from a document to render it subject to disclosure."

(Source Book, pp. 292, 293)

Senator Hart, having just offered Amendment No. 1361 concerning exemption 7, also stated:[14]

[14] See also Senator Hart's remarks in the November 21, 1974 Senate hearing overriding the veto wherein Senator Hart strongly opposed the agency categorical approach to withholding documents (Source Book, p. 451).

> Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes — a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the *particular* document should not be made.
>
> (Source Book, p. 332: emphasis added)

Senator Hruska (Nebraska) opposed the successful exemption 7 amendment with a written statement which in applicable part stated:

> Here are some of the effects which adoption of the Hart amendment could have.
>
> • • •
>
> 2. It could impose upon these agencies the tremendous task of reviewing each page of each document contained in any of their many investigatory files to make an independent judgment as to whether or not any part thereof should be released.
>
> (Source Book, p. 364)

Yet the Board, at the District Court hearing on the merits and even to the present, has refused to consider the particular statements which were requested — holding out to the Court there was "nothing unique" in the statements, "just normal statements" (A. 91). Clearly the amended FOIA applies equally to

the NLRB as to other government agencies. Congress enacted no special immunity for the NLRB or for any of its investigatory records.

The Board's continuing pre-amendment approach is shown by its General Counsel's April 15, 1975 letter of denial which stated in applicable part:

> • • •
>
> Inasmuch as the purpose of the FOIA was not intended to be for discovery of our *file* contents, and noting that the *Board's Rules* do not provide for discovery of any of the information you seek, the request must be denied. See Interboro Contractors, Inc. v. N.L.R.B., 432 F.2d 854, 857-860 (C.A. 2, 1970), cert. den., 402 U.S. 915, and Electromec Design & Development Co. v. N.L.R.B., 409 F.2d 631 (C.A. 9, 1969). (Pet. for Cert., App. E, p. 37A: emphasis added)
>
> • • •

To the contrary, the FOIA amendments did open up agency "files" and the Board's own internal restrictive disclosure rules are inapplicable to a valid FOIA request. The Board fails to realize the amended FOIA is not a section of the NLRA but a separate statute with which it must comply.

The Board has taken an intransigent and categorical position that all of its investigatory statements are nondisclosable *per se*. Such is undoubtedly contrary to the clear language of the amended FOIA and the supporting legislative history.

B. THE BOARD HAS OFFERED NO PROOF THAT DISCLOSURE OF THE REQUESTED INFORMATION WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS.

The statutory language of the amended FOIA (specifically 5 U.S.C. 552 (a)(4)(B)) squarely and clearly places the burden of proof in a *de novo* district court hearing on the government agency withholding requested information. As stated on page 15 of the November 2, 1977, Report of the Government Information and Individual Rights Subcommittee, 95th Congress, 1st session, *supra:*

> TAKING YOUR CASE TO COURT
>
> * * *
>
> As a plaintiff under the FOIA, you go into court with the presumption that right is on your side: the burden of proof is on the Government to justify withholding information. Whenever there is a doubt as to which side is right the courts are supposed to rule in favor of disclosure. Moreover, pursuant to the 1974 amendments to the act, judges are authorized to examine the contents of contested documents to determine whether all or any part of them can be withheld. The law requires that "reasonably segregable portions" of the exempt records be released: this means non-exempt portions that are intelligible.
>
> * * *

The legislative history of the 1974 FOIA amendments further establishes there is *no* presumption in favor of the agency's determination. Senator Muskie (Maine) who was opposed to any agency presumptions in the

de novo hearing stated in the May 30, 1974 debate on the FOIA amendments:

> I do not see why the head of a department should be able to walk into a judge's chamber, knowing that his testimony is against that of any other expert and weighs more than any other on a one-for-one basis. He has the additional weight that the exclusive judgment is given to him. He has all of that behind him.
>
> Why should he be given a statutory presumption in addition if he cannot make his case on its merits. He is in a better position to do that than anyone else.
>
> Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.
>
> We ought not to classify information by presumptions, but only on the basis of merit. And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it and not find it possible to get sustained only through the support of a statutory presumption.
>
> (Source Book, pp. 308, 309)

The opposition to Senator Muskie's position argued the court should sustain the agency if the court finds the Agency's determination was "reasonable." However, Senator Muskie's amendment was passed 56 to 29 by the Senate (Source Book, p. 328).

In supporting the Muskie amendment, Senator Ervin (North Carolina) stated:

Mr. Ervin. Mr. President, I rise in support of this amendment. It seems to me that we ought not to have artificial weight given to agency action, which the bill in its present form certainly would do.

It has always seemed to me that all judicial questions should be determined de novo by a court when the court is reviewing agency action. One of the things which has been most astounding to me during the time I have served in the Senate is the reluctance of the executive departments and agencies to let the American people know how their Government is operating. I think the American people are entitled to know how those who are entrusted with great governmental power conduct themselves.

* * *

I strongly support the amendment offered by the distinguished Senator from Maine, of which I have the privilege of being a cosponsor, because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

(Source Book, pp. 321, 322)

Thus the Board's historical "presumption" that disclosure of the requested statements would "interfere" is not entitled to any statutory "head-start." The

court's determination is to be made on the basis of demonstrable, judicial facts. The Board of course argues it has difficulty proving its case. This of course is always true when a party makes inferences not supported by facts. Congress was mindful of the Board argument when it passed the 1974 FOIA amendments over the presidential veto. In the November 21, 1974 Senate consideration which overrode the veto, Senator Thurmond (South Carolina) stated:

> Under this bill, Mr. President, these investigatory files would be exempt from disclosure only if the Government could prove that the release would cause harm to certain public or private interests. The President objected to this portion of H.R. 12471, since it would be almost impossible for the Government to establish in every instance that harm would result from a release of information.
>
> Instead, the President suggested that investigatory records of the Federal Bureau of Investigation and other law enforcement agencies should be exempt from the act if there is a "substantial possibility" of harm to any public or private interest.
>
> (Source Book, p. 466)

Senator Scott (Pennsylvania) in the November 21, 1974 Senate discussion concerning the President's veto stated:

> "I agree with him that it would be very difficult for the Government to prove to a court that disclosure of detailed law enforcement investigatory

files would be harmful. And I agree with him that "additional latitude" must be provided Government agencies during the information release period.

However, in spite of my sympathy with the purpose of the veto, I am convinced that I must vote to override.

(Source Book, p. 474)

Senator Hruska also stated during this debate, urging sustaining the veto:

Mr. President, every practitioner in administrative law knows that judicial review of agency decisions is not unlimited. The courts review agency decisions to determine whether they are reasonably based or whether they are arbitrary or capricious. This enrolled bill would establish a different type of review, however. It would empower a court to substitute its own decision for that of the agency. This is not review of agency decisions but the making of the decision itself.

* * *

The confidentiality of countless law enforcement files containing information of the highest order of privacy is jeopardized by this bill. At stake here is not simply the issue of effective law enforcement but the individual's right to privacy assurance of personal security, and to be secure in the knowledge that information he furnishes to a law enforcement agency will not be disclosed to anyone who requests it.

The enrolled bill requires the FBI and other law enforcement agencies to respond to any person's request for investigative information by sifting through pages and pages of files within strict limits. If the agency believes that information must be withheld from the public, it must prove to a court line-by-line that disclosure would disclose the identity of a source or confidential information furnished by him, would impair the investigation or would constitute an invasion of personal privacy.

Mr. President, it is extremely difficult if not impossible to prove that information, if disclosed, would invade a person's privacy or would impair the investigation. The magnitude of such a task and the standards of harm that are defined in the amendment create serious doubt as to whether such a provision is workable aside from its questionable wisdom. Where the rights of privacy and personal security are at stake, measures should not be adopted that even tend indirectly to undermine these fundamental rights.

(Source Book, pp. 456, 457)

Also in the House, Representative Aspin (Wisconsin) in the House's November 20, 1974 debate on the veto stated:

No, by their own actions the managers of those classification stamps have forfeited any presumption that their actions are reasonable. Let the courts decide.

The second objection raised in the veto message is simply a matter of administrative convenience. It is claimed that too great a burden is placed on the bureaucracy to act quickly and to demonstrate document by document that there is a need for secrecy. If the agencies had a history of cooperation with the spirit of freedom of information, if we did not have before us their history of stubborn, protracted, trench warfare, yielding nothing except under compulsion, then these arguments might carry some weight. But the record being the record, I cannot work up any great degree of sympathy for the administration's position. The President would have us build in loopholes for the agencies to snipe through. I see no reason to do so.

This bill, as we passed it before, is a major advance. I hope my colleagues support overriding the President's veto.

(Source Book, p. 421)

In his October 17, 1974 message to the House, President Ford stated his reasons for his veto of the FOIA amendments:

> Second, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court — separately for each paragraph of each document—that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and

> could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.
>
> (Source Book, p. 484)

The President's veto was subsequently overridden by Congress. Thus any withholding agency, without the benefit of a presumption in favor of its internal determination, has the burden of proving in a *de novo* court hearing that a particular exemption is applicable. The agency's proof must relate to the particular records requested and must disclose those records or parts thereof which it cannot prove to be exempt.

Before the District Court in the case *sub judice* the Board offered *no proof of any sort* (A. 71, 91). They only relied on the argument (not proof) the requested statements were exempted simply because they were Board statements.[15] Such approach does not satisfy the Board's statutory burden of proof. It is nothing more than the Board trying to lift itself by its own bootstraps. Congress had in mind proof of facts and not presumptions. The House Conference Report states "the Government should be given the opportunity to establish by means of *testimony or detailed affidavits* that the documents are clearly exempt

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[15] It is interesting to note that even in the Board's own Rules and Regulations regarding withholding of information (29 C.F.R. 102.118(a)) the Board does not list the investigative "statement" as a document to be specifically withheld even though the term statement is subsequently used in the same section and even defined therein (Resp. App. A).

from disclosure. The burden remains on the Government under this law" (Source Book, p. 114; emphasis added.

That the court should make its decision on the weight of "evidence" was also shown in a joint letter from Senators Mathias (Maryland), Case (New Jersey), Javits (New York), Baker (Tennessee), Kennedy (Massachusetts), Muskie (Maine), Hart (Michigan) and Ervin (North Carolina) to their colleagues urging overriding the FOIA amendments veto. The October 31, 1974 letter read in part:

> Dear Colleague: We are enlisting your support to override President Ford's veto of the Freedom of Information Act Amendments (H.R. 12471) when the Congress returns from the current recess. We believe that this veto is unjustified and urge that the legislation be enacted as previously approved by Congress.
>
> The 1966 Freedom of Information Act has worked neither efficiently nor effectively. There are loopholes in the statute. Agencies have engaged in delaying and obstructionist tactics in responding to requests for government information. The Freedom of Information Act Amendments will facilitate public access to information, while preserving confidentiality where appropriate.
>
> The President has proposed numerous specific changes to this legislation. Similar proposals were made by government agencies time and again over the past year and a half. These proposals were considered, they were debated, and in the end they were rejected during the legislative process.
>
> * * *
>
> We believe that the approach taken in the Amendments is the correct one. Federal courts should have the authority to review agency classification of documents and make their findings on the weight of the evidence.
>
> * * *
>
> The President has also decried the possibility of an administrative burden placed on law enforcement and other agencies by the new amendments, although we are pleased to note that he did not object to the opening of some new investigatory materials to the public. We believe, however, that the additional delays, charges, and exclusions requested by the President do more than alleviate administrative burden—they would effectively bar access to some records by the press, the nonaffluent, and the scholar.
>
> Freedom of Information is too precious a right to be sacrificed to false economy. Like due process, it may carry some cost; but that is a cost to be borne by all Americans who would keep our government open and accountable and responsible.
>
> Government agencies universally opposed original enactment of the Freedom of Information Act in 1966, and they likewise opposed enactment of amendments to the Act this year.

• • •

(Source Book, pp. 462, 463)

This Court, in *Department of the Air Force v. Rose*, 425 U.S. 352, 358 (1976), affirmed the Second Circuit's decision finding the agency had not carried its burden in the District Court, imposed by the Act, of "sustain[ing] its action by means of affidavits of testimony . . . " See also the District of Columbia Circuit's decision in *Vaughn v. Rosen*, 523 F.2d 1136 (1975) where the agency's burden of proof was not even satisfied with "conclusory" affidavits (*Id.*, pp. 1145-1147).

C. THERE IS NO PRESUMPTION UNDER THE 1974 FOIA AMENDMENTS DISCLOSURE WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS.

As discussed in subsection B *supra*, the FOIA amendments require proof not bootstrap presumptions. The Board has not met its burden of proof in the instant case. Instead the Board relies on Senator Hart's reading of the 1966 FOIA regarding exemption 7 (Pet. Br. pp. 27-29) and upon Senator Humphrey's remark that Board witnesses enjoyed no protection prior to testifying (Pet. Br., p. 24, fn. 11).[16] What the Board fails to come to grips with is that the 1974 FOIA amendments to exemption 7 were not a mere continuation of the Board's *per se*, non-disclosable

[16] Senator Humphrey apparently was mistaken as the Board protects under 29 U.S.C. 158(a)(4) those filing charges, giving statements, or otherwise utilizing the Board's processes, even if such person(s) never testify.

approach. Senator Hart when proposing the amendments to exemption 7 said:

> "In determining whether or not the information to be released will *interfere* with a law enforcement proceeding it is *only* relevant to make such determination in the context of the *particular* enforcement proceeding."
>
> (Source Book, p. 333: emphasis added)

Yet the Board refuses to consider the particularities in the case at hand (A. 91). This is exactly the "wooden and mechanical" approach which caused Congress to amend the 1966 FOIA. Interference with an enforcement proceeding was only relevant in the context of that particular proceeding according to Senator Hart. In this vein if such interference existed then under Section 5 U.S.C. 552 (a)(4)(B) it was incumbent on the Board to sustain its burden of proof. This it did not do because it could not, there being no interference.

The statements in the case at hand were requested only seven (7) days before the hearing, a time when the Board had completed its investigation. The request was limited to only those statements of witnesses the Board would call, thus having no effect on those whose statements would remain confidential. The requested statements would be disclosed only a few days later at the hearing under the Board's own rules (29 C.F.R. 102.118 (b)(1) — see Resp. App. A). These witnesses according to Board procedures had even previously been told their statements would be disclosed later at a hearing. Thus the possibility of subsequent disclosure did not adversely affect the giving of the statement.

There is no evidence Respondent has ever been found guilty of an unfair labor practice charge[17] or had threatened or taken any action against any person because he or she gave the Board a statement or co-operated with the Board in any manner. Furthermore there is nò evidence Respondent had made any threats or taken any action to interfere with the enforcement proceeding. The Board's position would have the effect of pre-judging Respondent guilty of illegal activities. This is contrary to our system of presumed innocence.

In fact while the Board cries "wolf," the facts show the Board has little to worry about. The Board's own 1977 Annual Report (42nd annual report for the fiscal year ended September 30, 1977, G.P.O. 1977) at Table 2 on page 221 shows that for fiscal 1977 only 3.1% of the unfair charges against employers concerned 8(a)(4) allegations. The handling of an 8(a)(4) charge is not even considered an "expedited" or "priority" case as with allegations concerning other sections of the NLRA.[18] If employees were in fact coerced, retaliated against, interefered with, etc. for giving statements or testifying then the Board's satistics would be entirely different. However, such interference is not a reality and thus there was no proof.

Further evidence that the Board's presumption herein is unwarranted is found in the Board's admissions in its own Memorandum 78-4 issued by its

[17] Section 8(a)(4) states it is an unfair labor practice for an employer "to discharge or otherwise discriminate against any employee because he has filed charges or given testimony under the Act;" (29 U.S.C. 158(a)(4)).

[18] See 29 C.F.R. 101.4.

General Counsel January 27 of this year. That Memorandum is reproduced in Resp. App. B and admits with regard to back pay cases the Board's previous guidelines on disclosure "may be more restrictive than necessary and broader disclosure of these cases would be beneficial to the resolution of back pay disputes." The Board therein changed its back pay disclosure regulations to provide for disclosure of witness statements. The revised regulations also provide for the factual/deliberative distinction discussed *infra.* regarding the Board's exemption 5 claim. Also with regard to the exemption 5 work-product argument discussed *infra* the Board seems to focus on the "mental impressions, conclusions, opinions or legal theories of an attorney or other party concerning the litigation" as opposed to the factual elements of work-product.

The case at hand is not the first time the Board has *presumed* interference with enforcement proceedings. In *Getman v. NLRB*, 450 F.2d 670 (C.A. D.C., 1971), involving an FOIA action to obtain copies of voting lists, the Board withheld the lists claiming exemption 7.[19] The Board claimed there would be interference with its election procedures. The Circuit Court, ordering disclosure, said:

[19] "This court makes no effort to conceal its disapproval of the NLRB's apparent policy of restricting discovery in all proceedings to the bare legal minimum regardless of the circumstances of the case. It is this frustrating and in some cases unjust policy which has led to a rash of FOI Act suits against the NLRB and has compelled that agency to acquire the great familiarity with the FOI Act that it obviously possesses."

Deering Milliken, Inc. v. Nash, 90LRRM at 3149 (1975)

Interference with the "laboratory conditions" required to conduct these elections may in deed result in elections being set aside, as the Board contends. But there is no proof to support the contention. It will be time enough to consider the relief to which the Board is entitled if and when a showing of disruption of Board functions is made.

We agree with appellees that it is ironic that the Board should attempt to use speculation about added delays in the prompt resolution of questions of representation as a basis for preventing this study. One of the primary goals of the study is to consider the feasibility of changing Board rules to eliminate unnecessary grounds for challenges to elections, so as to streamline the entire process. Thus the Board is taking a too shortsighted view of its own self interest. Moreover, the Board's position suffers from the obvious self-justifying tendency of an institution which in over 30 years has itself never engaged in the kind of much needed systematic empirical effort to determine the dynamics of an election campaign or the type of conduct which actually has a coercive impact. The public interest need for such an empirical investigation into the assumptions underlying the Board's regulation of campaign tactics has for some time been recognized by labor law scholars.

(*Id.*, pp. 675, 676)

The Board also had applied to Justice Black of this Court for a stay of the District Court's order. Justice Black, in denying the requested stay, said:

> The Government applies for a stay on the

> ground that the district court order requiring the Board to comply with the Freedom of Information Act and deliver the records in question to respondents would interfere with the representation election procedures under the National Labor Relations Act, 49 Stat 449, as amended. The Board was created by Congress and Congress has seen fit to make identifiable records of the Board and other government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the Board to refuse promptly to turn over the requested records. I deny the application for stay without prejudice to the Government to present its application to another Member of this Court
>
> (404 U.S. 1204, 1205 (1971))

Following disclosure of the requested information under the FOIA, Professors Getman, Goldberg and Herman conducted an empirical study to determine the validity of the Board's longstanding assumptions of interference in the election process. The results of their study are published in *Union Representation Elections: Law and Reality* (Russell Sage Foundation, New York, 1976; Library of Congress Catalog Number: 76-13271). In the Foreward, Harvard University President Derek C. Bok wrote:

* * *

> Unlike many empirical studies, their work arrives at clearcut conclusions that make a massive attack on the assumptions that support an entire body of regulatory law.
>
> * * *
>
> Ironically, one must recognize at the outset

that the Board is singularly ill-equipped to evaluate the study. Neither the members of the Board nor its staff are social scientists, and the research unit established in the early years of the NLRB was long ago dismantled by Congress as a result of repeated charges that it was infested by persons of Communist persuasion. The shortsightedness of Congress is sharply revealed by this book, for the study carried out by Getman, Goldberg, and Herman is precisely the type of work that the Board ideally should have conducted decades ago to make certain that its rules were truly based on the best available data. As it is, the present study must be received by a Board that is poorly prepared to evaluate its findings and ill-disposed at this late date to accept a body of conclusions that calls in question a whole multitude of rules that have been in force for many years.

In the study itself, Professors Getman, Goldberg and Herman conclude:

> Board regulation traditionally has been defended by reference to the Board's expert ability to determine which campaign tactics are likely to interfere with employee freedom of choice. The Board has claimed such expertise, and the courts have generally acquiesced in this claim. In recent years, however, courts and commentators have begun to challenge the assumption of Board expertise, pointing out that the source of the Board's presumed special knowledge has never been identified. Judge Skelly Wright described the Board as "an institution which in over thirty years has itself never engaged in the kind of much needed systematic empirical effort to determine the dynamics of an election campaign or the type of conduct which actually has a coercive impact." Indeed, the Board has not permitted the introduction of evidence as to whether particular conduct had a harmful impact on employees involved in a given election.
>
> > "In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice."
>
> The Board's rules concerning the circumstances under which it will find a tendency to coerce employee choice are thus not grounded on factual data, but on guesses or assumptions. However, nothing in the collective activities or experience of the Board insures the accuracy of these assumptions. To be sure, many of the Board's members and staff have spent years interpreting and applying Board rules in terms of the policies, language, and legislative history of the NLRA. But the process of elaborating and harmonizing rules of decision provides no information about the validity of the assumptions underlying those rules.
>
> Some Board members and staff have served as lawyers for employers or unions involved in organizing campaigns, while others have been attorneys in NLRB regional offices, engaged in investigating objections and unfair labor prac-

tice charges. Many of these people have observed that a particular employer campaign tactic was followed on one or more occasions by a union loss. Therefore, they may have assumed that the union loss was due to this tactic. There are two possible flaws in this assumption. Initially, the observations on which it is based may not be representative. The same tactic may be followed just as frequently by a union victory. Alternatively, the union loss may have been caused by factors other than the tactic that impressed the observer.

The Board has no means of determining the actual effect of the tactics used in union representation elections. Prior archival and field studies, though limited in scope, have indicated the potential value of empirical research in resolving this question. Our study was designed to provide the broadly based empirical data necessary to evaluate the effectiveness of campaign tactics used in union representation elections and the propriety of the Board's regulation of those tactics.

* * *

THE BOARD'S ASSUMPTIONS

The Board rarely articulates its assumptions. Frequently, when it sustains objections to an election, it asserts only that the "totality" of the conduct alleged to be unlawful was such as to interfere with free choice. In such cases it is difficult to determine precisely which conduct was objectionable, let alone why. Moreover, the Board is not consistent. The same assumption is given different weight in different cases, and, at

times, one assumption is discarded in favor of its opposite.

(*Id.*, pp. 4-7; footnotes omitted)

Following publication of the professors' study the Board reversed in *Shopping Kart Food Market and Retail Clerks, Local 99, AFL-CIO*, 228 NLRB No. 190, 94 LRRM 1705 (1977), its long standing "presumption" of election interference enunciated in the Board's 1962 *Hollywood Ceramics Company, Inc.* decision, 140 NLRB 221, 51 LRRM 1600 (1962). The Board cited the professors' study as well as other court decisions and studies. The Board thus again admitted another[20] of its "presumptions" was contrary to empirical, provable facts.

The Fifth Circuit in the case *sub judice* did not subscribe to the Board's unproven presumption and inference that disclosure "would interfere with enforcement proceedings." The Fifth Circuit does not stand alone in rejecting this *per se* agency approach. In *Hospital Authority v. Perry*, —F.2d —, 16 FEP 68 (C.A. 4; January 26, 1978), the Equal Employment Opportunity Commission (EEOC), an agency also concerned with the employer-employee relationship and with prohibited employment discrimination, refused to disclose statements obtained by the EEOC during an investigation of charges. The EEOC's refusal was based in part on exemptions 5 and 7(A). In the *de novo* District Court hearing, the Court, based on its *in camera* examination of the requested statements, ordered the EEOC to disclose some of the re-

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[20] See discussion *supra* concerning Board's Memorandum 78-4 (Resp. App. B).

quested statements. The Fourth Circuit affirmed,[21] stating:

> [1974 AMENDMENTS]
>
> The circumstances prompting the 1974 Amendments make clear their purpose. Congress was unquestionably dissatisfied with the broad application given exemption 7 of the original Act by the courts and with the niggardly way in which the courts were allowing disclosure of investigatory files. Despite the fact that the FOIA was designed to encourage disclosure, the courts had given an expansive interpretation of a number of the exemptions in the Act, including particularly exemption 7, under which statements procured in the course of the open investigation by an agency were *per se* nondisclosable, irrespective of the equities of the situation. Among the cases instanced in this regard is our own Wellman Industries, Inc. v. NLRB (4th Cir. 1974) 490 F.2d 427, 429-430, 82 LRRM 2857.
>
> To correct this application of exemption 7 by the courts, the Congress in 1974 amended exemption 7 by providing that such exemption protected investigatory records from disclosure "only to the extent that the production of such records would (A) interfere with enforcement proceedings * * *" or "(D) disclose the identity of a confidential source * * *." In order that the courts in applying such exemption might be provided with an adequate factual basis for determining

[21] The EEOC has not petitioned for certiorari but has disclosed the statements as ordered.

> whether disclosure would "interfere with enforcement proceedings," or disclose a "confidential source," Congress by the same Amendments gave the courts the right to make *in camera* inspections of all requested documents prior to ruling on disclosure under exemption 7.
>
> It is manifest from this legislative history of the 1974 Amendments that Congress intended to proscribe the use of a mechanical test such as that enunciated in Title Guarantee in favor of "a case-by-case" factual inquiry in determining whether to require disclosure of investigatory records. Specifically, as has been aptly observed, there was in the legislative history nothing to support "the reliance * * * on the distinction between open and closed investigatory files." Rather, the legislative record demonstrates, as the same commentator adds, that the "only factor" to be considered in connection with the disclosure of investigatory records, whether of an open or a closed investigation, "was whether the files would interfere with enforcement proceedings if released," or disclose a "confidential source;" and the author is unquestionably right in declaring that the rule adopted in Title Guarantee and followed in other cases "conflicts with the purpose of the 1974 Amendments" and, if followed, "precludes the effective use of the *in camera* inspections which are expressly permitted by the 1974 Amendments."
>
> In our opinion, the district court conformed in its decision to the procedure established by the 1974 Amendments. It examined *in camera* the

affidavits obtained by the EEOC from the charging parties. Based on that *in camera* inspection, it concluded that the statements procured from all present employees of the Hospital should not be disclosed because such disclosure might interfere with the EEOC investigation but that the disclosure of the statements procured from former employees would not interfere or disclose confidential sources. It accordingly denied the disclosure of the statements of present employees and ordered the disclosure of those of former employees. In our opinion the court did not abuse its discretion in the selection of the records to be disclosed. See Columbia Packing Co., Inc. v. U. S. Dept. of Agri. *supra*, 563 F.2d at 500.

[2] We find no error in the order for disclosure of the statements of former employees or to the court's finding that such disclosure would not interfere with the EEOC investigation. That finding was based on an *in camera* examination of the affidavits themselves. The EEOC does not argue that the district court's finding, after such review, that disclosure would not have a chilling effect on present employees or would not interfere with the investigation is erroneous; it contends rather for a strict *per se* rule of nondisclosure, which the 1974 Amendments clearly proscribed and for which there is, in our opinion, no warrant. Indeed, the grant of a right to *in camera* review can only relate to open investigation, since obviously there can be no interference arising out of disclosure if the investigation is closed.

(*Id.*, 16 FEP at 685, 686 (1978); footnotes omitted)

The Fourth Circuit did not buy the *per se* approach as did *Title Guarantee*[22] and those circuits which have fallen in step[23]

The Second Circuit admitted in *Title Guarantee* (*Id.*, p. 492) it "was impressed with the appellee's grasp of the FOIA amendments and almost persuaded by its argumentation and that of the district court . . .".[24] The Second Circuit focused on the Board's internal disclosure rules and found Congress did not intend to change those rules by the FOIA (*Id.*, p. 492). The Second Circuit missed the point that FOIA was not intended to replace any particular discovery rules[25] applicable between the agency and parties with whom it deals. The 1974 amended FOIA set up a separate standard for all agencies on disclosure to the public. *Title Guarantee's* approach penalizes the requesting party if the party happens to be in litigation with the

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[22] *Title Guarantee Co. v. N.L.R.B.* 534 F.2d 484 (1976).

[23] E.g., *Goodfriend Western Corp. v. Fuchs*, 535 F.2d 145 (C.A. 1), certiorari denied, 429 U.S. 895; *Roger J. Au & Son, Inc. v. N.L.R.B.* 538 F.2d 80 (C.A. 3); *N.L.R.B. v. Hardeman Garment Corp.*, 577 F.2d 559 (C.A. 6); *Abrahamson Chrysler-Plymouth, Inc. v. N.L.R.B.*, 561 F.2d 63 (C.A. 7); *Harvey's Wagon Wheel, Inc. v. N.L.R.B.*, 550 F.2d 1139 (C.A. 9); *Climax Molybdenum Co. v. N.L.R.B.*, 539 F.2d 63 C.A. 10); *New England Medical Center Hosp. v. N.L.R.B.*, 548 F.2d 377 (C.A. 1).

[24] The District Court's opinion (407 F. Supp. 498) was an extremely well researched and reasoned opinion.

[25] "It is sufficient for us to hold that Rule 26(b) does not authorize an agency to withhold any records which the [FOIA] commands it to disclose", *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.*, 508 F.2d 945 at 950 (C.A. 4, 1975)

agency.[26] This is contrary to this Court's finding in *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, at fn. 10 where this Court stated "Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public."

The Second Circuit's *Title Guarantee* decision is also inconsistent with the liberal disclosure requirements of the amended FOIA. This Court in *Sears* stated:

> The Act's background and its principal objectives are described in EPA v. Mink, 410 U.S. 74, 79-80 (1973), and will not be repeated here. It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) (hereinafter S. Rep. No. 813); EPA v. Mink, supra, at 80. As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions.
>
> (*Sears*, 421 U.S. at 136)

The Second Circuit in *Title Guarantee* held that "Absent a clearer indication of contrary congressional in-

[26] The Board's March 2, 1978 Report to the Senate and the House, required under 5 U.S.C. 552(d) at page 7 therein states ". . . 652 of the 1518 recorded requests were from parties to a proceeding . . .".

tent, we are not prepared to hold that disclosure may be required under the FOIA in connection with an ongoing unfair labor practice enforcement proceeding" (534 F.2d at 491). A review of the legislative history of the 1974 FOIA amendments makes clear Congress was fed up with restrictive, categorical non-disclosure. This was precisely the point. Even if "congressional intent" was not altogether "clear" to the Second Circuit the legislative history and the decisions of this and other courts resolve any doubt in favor of disclosure.

This Court in *Department of the Air Force v. Rose*, 425 U.S. at 365, 366, quoted with approval from *Vaughn v. Rosen*, 523 F.2d at 142:

> Reinforcing this interpretation is "the clear legislative intent [of the FOIA] to assure public access to all governmental records whose disclosure would not *significantly harm* specific governmental interests." [Soucie v. David, 145 US App DC 144, 157, 448 F2d 1067, 1080 (1971)]. As a result, we have repeatedly stated that "[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly." [Ibid., Vaughn v. Rosen, 157 US App DC 340, 343, 484 F2d 820, 823 (1973).] Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure. (emphasis added)

Congress' intent should have been clear to the Second Circuit and its progeny. During the May 30, 1974 Senate discussions Senator Kennedy stated:

When Congress passed the Freedom of Information Act, it issued a rule of Government that all information with some valid exceptions was to be made available to the American people — no questions asked. The exceptions — intended to safeguard vital Defense and State secrets, personal privacy, trade secrets, and the like — were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.

But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people — the people are not their servants.

> Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The Government, however, has no rights. It has only limited power delegated to it from we, the people.
>
> (Source Book, pp. 286, 287)

Representative Erlenborn (Illinois) in the March 14, 1974 debate and vote remarked:

> In addition, H.R. 12471 mandates that the Government respond quickly to complaints filed under this act and, at the discretion of courts, pay attorney fees and other litigation costs incurred by victorious plaintiffs. The measure also establishes that agencies shall report annually to the Congress on their performance under the act. All these provisions are designed to stimulate agencies to comply more completely and promptly with the

> law, and on close questions, to decide in favor of disclosure of information to the public.
>
> (Source Book, p. 245)

The *Title Guarantee* approach, like that of the Board herein,[27] is anachronistic. The Board would have this Court approach exemption 7 as if Congress had not overriden the Presidential veto. Attorney General Levi in his Memorandum on the 1974 Amendments to the Freedom of Information Act (February, 1975) wrote with regard to the changes in exemption 7:

> The 1974 Amendments to the Freedom of Information Act *substantially* altered the exemption concerning investigatory material compiled for law enforcement purposes.
>
> (Source Book, pp. 514, 515, emphasis added)

In his earlier December 11, 1974 "Preliminary Guidance" Memorandum, the Attorney General also referred to the amendments to exemption 7 as "substantive" (Source Book, p. 553). Senator Hruska in the May 30, 1974 debate on the amendments termed such as "major, substantive changes" (Source Book, p. 363).

The pre-amendment arguments the Board advances are that prehearing disclosure of these "typical" statements would interfere or harm enforcement proceedings. Of course the Board's own Memorandum 78-4 (Resp. App. B) shows the Board's presumptions

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[27] Senator Ervin's reminiscence of a young lawyer's comment on non-disclosure in a lawsuit is indicative of Congress' intent for agencies to quit withholding information. (Source Book, p. 461)

are without foundation. Respondent has already cooperated with the Board, furnishing documents, witness statements, etc. setting forth its position and evidence. There is no danger of frustrated proceedings or constructed defenses. As the *Getman* study shows Board concern about fears of employees is not founded in fact. The Board even admits it advises witnesses their statements may later be disclosed to their employer.

Quite to the contrary of the Board's argument, disclosure of witness statements would encourage settlement and thus even improve the Board's settlement percentage cited in footnote 4, p. 17 of its brief. The Board obviously recognizes this on pages 19 and 20 of its brief when it admits its agents are directed to "openly discuss" the nature of the evidence on specific violations when pursuing a likely settlement.

The FOIA was amended in 1974 but the Board will not concede the amended Act requires any more disclosure. However, the Sixth Circuit notes in *Hawkes v. Internal Revenue Service*, 507 F.2d 481, 485 (C.A. 6, 1974) "that Congress has recently passed amendments to the Act which have further broadened the scope of disclosure." While not ruling specifically on the Board's exemption 7 argument, this Court in *Sears*, *supra*, noted its disapproval of the Board's *per se* approach by stating:

> The legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel, see p. 28, supra, which relieve the Government of the obligation to show that disclosure of a particular investigatory file would

> contravene the purposes of Exemption 7. S Conf Rep No. 93-1200, (1974). The language of the amended Exemption 7 and the legislative history underlying it clearly reveal a congressional intent to limit application of Exemption 7 to agency records so that it would apply only to the extent that "the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute [an] . . . unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures".
>
> (*Sears*, 421 U.S. 164, 165)

This Court also noted:

> Since the General Counsel failed in the District Court to assert a claim under the *version of Exemption 7 which was, if anything, more favorable to his position than the current version*, the Court of Appeals on remand should determine whether petitioners are foreclosed from further pursuing the issue. We note in addition, however, that a court of equity may always amend its decree on a proper showing, and the District Court may wish to do so, if the General Counsel demonstrates an injury to his functions of the type sought to be prevented in Exemption 7, resulting from the disclosure of a *particular* Advice or Appeals Memorandum.
>
> (*Id.*, 165; emphasis added)

In sum the Board has not carried its statutory burden of proof that disclosure of the requested statements would interfere with the enforcement proceed-

ing. The Board does not have the benefit of any presumptions in the *de novo* court hearing. The amended FOIA clearly requires disclosure of all or even parts of requested investigatory records unless the Board's evidence is sufficient to carry its burden of proof regarding the particular documents or parts thereof. Here the Board offered no proof of any sort and it is not therefore entitled to withhold under exemption 7(A).

II. THE BOARD HAS NOT PROVED THE REQUESTED INFORMATION IS ANYTHING OTHER THAN FACTUAL INFORMATION, NOT WITHIN THE FOIA EXEMPTION 5 FOR DELIBERATIVE AND POLICY MATTERS.

The requested statements may not be withheld unless the Board proves they are:

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
>
> (5 U.S.C. § 552(b)(5))

At the District Court hearing, the Board, as the District Court found, made no claim that the written statements were "memorandums" or "letters." Neither did the Board assert that the requested statements possessed a deliberative, as opposed to a factual quality (A. 63). The statements are nothing more than witness' recollections of factual situations (A. 91). Under 552 U.S.C. (a)(4)(B) the Board has the statutory burden of proving the requested information was an "inter-agency or intra-agency memorandum

or letter." The Board however offered no proof whatsoever at the hearing and thus is not entitled to withhold under exemption 5.

In *Poss v. NLRB*, 565 F.2d 654 (C.A. 10, 1977) which has fallen in step with the early *Title Guarantee* decision, the Tenth Circuit on a FOIA request concerning witness statements found exemption 5 "clearly inapplicable." The Circuit Court stated at p. 659:

> Exemption (5)
>
> [5] This exemption concerns inter-agency or intra-agency memorandum or letters. Such is clearly inapplicable to the present case. We are here concerned with notes taken by a Board investigator during an interview, and, in certain instances, affidavits given by the person interviewed. Such do not constitute inter-agency or intra-agencies memorandum or letters. Nor would such notes or affidavits be deemed as the work product of an attorney. See, for example, N.L.R.B. v. Sears, Roebuck § Co., 421 U.S. 132, at pp. 154, 155, 95 S. Ct. 1504, for a discussior of this matter.

The Board has not petitioned for certiorari in the *Poss* case (Pet. Br., p. 33, fn. 17).

A. FACTUAL INFORMATION MAY NOT BE WITHHELD UNDER EXEMPTION 5 OF THE FOIA.

In the *N.L.R.B. v. Sears* case, 421 U.S. 132 (1975), this Court citing *Environmental Protection Agency v. Mink*, 410 U. S. 73 at 87-93 (1973), noted

that *factual* documents were probably *not* entitled to exemption 5 treatment. (*Sears*, p. 161, fn. 27)

In *Mink*, *supra*, at page 89, this Court said:

> Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires a different treatment for materials reflecting deliberative or policymaking processes on the one hand, and *purely factual, investigative matters* on the other. Nothing in the legislative history of Exemption 5 is contrary to such a construction. (Emphasis added)

In *Soucie v. David*, the D.C. Court of Appeals found:

> That exemption [(b)(5)] was intended to encourage the free exchange of ideas during the process of deliberation and policymaking, accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, *but not purely factual or investigatory reports.* Factual information may be protected only if it is inextricably intertwined with policymaking processes . . . But courts must beware of a government litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue.
>
> (*Id.*, 448 F.2d 1067 at 1077, 1078 (1971); footnotes omitted; emphasis added)

See also *Stokes v. Brennan*, 476, F.2d 699 at 703, 704 (C.A. 5, 1973).

There is no evidence that the requested statements contain anything but purely factual information and thus are not entitled to exemption 5 treatment accorded to deliberative materials. The purpose of exemption 5 was not to shield "primary information, such as verbatim witness testimony or objective data"[28] but to protect the "papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."[29] The requested statements are thus not exempt under 5 U.S.C. 552(b)(5) and must be disclosed.

B. THE BOARD'S EXEMPTION 5 CLAIM, INCLUDING THE "WORK-PRODUCT" ARGUMENT, HAS NOT BEEN ACCEPTED BY THE COURTS

Exemption 5 has been one of the Board's makeweight arguments in many of its refusals to disclose requested statements. It has inconsistently defended withholding of such statements on an exemption 5 basis and the included "work-product" aspect of exemption 5. Even its benchmark *Title Guarantee* case, *supra*, did not back[30] its exemption 5 defense which included the "work-product" argument. The Tenth Circuit's *Poss* decision, *supra*, squarely rejected this contention.

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[28] *Kent Corp. v. NLRB*, 530 F.2d 612 at 624 (C.A. 5, 1976).

[29] *Sears*, *supra*, p. 153.

[30] The Circuit Court found it unnecessary to rule on exemption 5 but it cited the lower court's decision and the many other cases rejecting the exemption 5 claim (534 F.2d 484 at 492, fn. 15).

In *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (1977), the Fourth Circuit also considered the same exemption 5 arguments the Board now makes. In rejecting the Board's contention the Fourth Circuit stated:

> IV
>
> The General Counsel also invokes 5 U.S.C. § 552(b)(5) which exempts from disclosure "intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."
>
> * * *
>
> [10] The Supreme Court has construed exemption 5 as permitting an agency to withhold documents which are privileged and, therefore, normally not available in pre-trial discovery to a person engaged in litigation with the agency. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-55, 95 S. Ct. 1504, 44 L.Ed.2d 29 (1975). In stating this rule, the Court noted that the particular needs of a specific litigant do not affect the agency's obligation to disclose. Consequently, only those memoranda which would not "routinely be disclosed" in private litigation are exempt. Sears, 421 U.S. at 149 n. 16, 95 S. Ct. 1504; H.R. Rep. No. 1497 at 10, reprinted in Senate Judiciary Committee, 93d Cong. 2d Sess., Freedom of Information Act, at 22.
>
> The General Counsel claims that the requested documents would not be discoverable, and thus are exempt from disclosure under § 552(b)(5) on the following grounds: (a) attorney's work-product privilege, (b) executive privilege,

> and (c) the limitations upon discovery of experts' reports.
>
> [11] Without defining the "outer boundaries of the attorney's work-product rule," the Court observed that exemption 5 "clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." Sears, 421 U.S. at 154, 95 S. Ct. at 1518. Without doubt, it also applies to the "mental impressions, conclusions, opinions, or legal theories" of the General Counsel's attorneys and other representatives. See Federal Rule of Civil Procedure 26(b)(3).
>
> The Court has set forth the parameters of executive privilege under exemption 5 more completely than those of the work-product privilege. In EPA v. Mink, 410 U.S. 73, 93 S. Ct. 827, 35 L.Ed.2d 119 (1973), the Court held that the doctrine of executive privilege entitles an agency to withhold from disclosure "intra-agency advisory opinions," and other information reflecting "deliberative or policy making processes." 410 U.S. at 86-89, 93 S. Ct. 827. The Court, however, observed that the executive privilege has "finite limits, even in civil litigation." Accordingly, it held that "in the absence of a claim that disclosure would jeopardize state secrets, . . . memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private

parties in litigation with the Government," Mink, 410 U.S. at 88, 93 S. Ct. at 836.

The General Counsel argues that the work-product privilege is not limited by the factual-deliberative distinction set forth in Mink; instead, this privilege embraces all factual material assembled for trial by a litigant's attorney or other representative.

[12] We cannot accept the General Counsel's interpretation of exemption 5. To allow such a broad exemption under the work-product rule would frequently swallow the distinction between factual and deliberative matters so carefully delineated by the Court in Mink. The General Counsel's argument would lead to the anomalous result of withholding factual material despite the Supreme Court's recognition that the same material would not be withheld under executive privilege because it "would generally be available for discovery by private parties in litigation with the Government." Mink, 410 U.S. at 88, 93 S. Ct. at 836. Therefore, we view the factual-deliberative distinction emphasized in Mink relevant to a consideration of the work-product privilege.

(*Id.*, pp. 1137, 1138, footnotes omitted)

For instance see: *Hospital Authority v. Perry (EE OC)*, — F.2d —, 16 F.E.P. 68 at fn. 5 (C.A. 4, Jan. 26, 1978); *Goodfriend Western Corp. v. Fuchs*, — F. Supp. —, 92 LRRM 2461, (Mass., 1976) rev. on other grounds; *Climax Molybdenum Co. v. NLRB*, 407 F. Supp. 208 (Colorado; 1975) affirm. on other grounds.

Not only have the courts rejected the Board's exemption 5 argument with its work-product facet, but often the Board has itself not even raised the exemption 5 claim.[31] See *Au & Son, Inc. v. NLRB*, 405 F. Supp. 1200 (W.D. Pa., 1976) affirmed on other grounds; *Wellman Industries, Inc. v. NLRB*, 490 F.2d 427 (C.A. 4, 1974), cert. denied, 416 U.S. 993; *NLRB v. Hardeman Garment Corp.*, 406 F. Supp. 510 (W.D. Tenn, 1975), rev. on other grounds; *Abrahamson Chrysler-Plymouth, Inc. v. NLRB*, 561 F.2d 63 (C.A. 7, 1977); *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139 (C.A. 9, 1976); *Proctor & Gamble v. NLRB*, — F. Supp. —, 97 LRRM 2904 (N.D. Texas, Feb. 10, 1978).

In *Guidelines of NLRB General Counsel for Regional Processing of Requests Under Freedom of Information Act*, dated July 8, 1975,[32] the Board's General Counsel spoke of the advice and appeals memoranda discussed in *Sears*, *supra*, and further stated:

> "Other material which would come within exemption 5 as defined by *Sears* would include final investigation reports, legal research memoranda prepared by Board agents during the investigation of a case. Board agents' case notes and memoranda to the file or to supervisors, requests for advice, Regional Office comments on appeal, drafts of decisions and directions of elections or decisions and orders, recommendations for ap-

[31] The Board's March 2, 1978 FOIA Report to the House and Senate, *supra*, p. 2, shows exemption 5 was not claimed in 53 instances where exemption 7(A) was claimed.

[32] Reprinted in *White Collar Report* (Bureau of National Affairs, Inc.), No. 957, August 8, 1975, at pp. C-1 and C-7.

proval of election agreements, and recommendations to issue notice of hearing.

* * *

This is not intended as an exhaustive list. There may well be *other memoranda or letters reflecting the frank discussion necessary to the deliberative process which exception 5 protects.* (Emphasis added)

Notably absent from this specific list of documents is the Board's investigative affidavit. Furthermore, in his Appendix of "Responses to FOIA Requests," General Counsel does not recommend invoking exemption 5 when a request for witness statements is received; he recommends refusing the request *only* on the bases of exemptions 7(A), (C) and (D). *Id.* at C-11 ("Table of Contents"), C-14 (#7A-3) and C-16 (#7C-3, #7D-3).

In its brief, p. 46, fn. 26, the Board refers to the facts in *Hickman v. Taylor*, 329 U.S. 495 (1947). The *Hickman* case is different from the instant case as statements were sought concerning persons whose identities were known to the requesting party. Also the testimony of these persons was available as these persons had already given public testimony which had been recorded and was available to the requesting party. The requested information there also contained the mental impressions of the attorney. However, in the instant case Respondent has no knowledge of which persons[33] gave written statements to the Board or who

[33] Only the Board knows which if any of these persons are Respondent's employees (A. 108, fn. 3).

will be called to testify; so it has no way to gather the information contained in these statements. The strictures placed by the Board (i.e., see *Johnny's Poultry*, 146 NLRB 770 (1964)) on interviewing employees prevent an employer from gathering information from an unwilling employee. Furthermore, the requested statements are merely factual accounts of witnesses and do not contain a Board attorney's mental impressions.

As this Court said in *Sears, supra*, at p. 154:

> Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation *which set forth the attorney's theory of the case and his litigation strategy.* (Emphasis added)

In sum, all facets of exemption 5 — the executive privilege, attorney work-product, etc. — have been interpreted in a way consistent with the factual/deliberative distinction. This approach is consistent with the legislative intent to protect the agency's decision making process yet construing exemption 5 very narrowly to allow maximum disclosure. The Board has not proven the requested information is anything but factual information. It cannot be withheld under exemption 5.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

APPENDIX A

The National Labor Relations Board ("NLRB" or "Board") has promulgated internal regulations regarding release of information in its possession. Relevant excerpts from the NLRB's Rules and Regulations, Series 8, as amended, 29 C.F.R. §§ 102, *et seq.*

SUBPART K — RECORDS AND INFORMATION

Freedom of Information Regulations

Sec. 102.117 Board materials and formal documents available for public inspection and copying; requests for identifiable records; files and records not subject to inspection; fees for copying and production; access to and amendments of records pertaining to individuals in systems of records.

(a)(1) The following materials are available to the public for inspection and copying during normal business hours: (i) All final opinions and orders made in the adjudication of cases; (ii) administrative staff manuals and instructions that affect any member of the public (excepting those establishing internal operating rules, guidelines, and procedures for the investigation, trial, and settlement of cases); (iii) a record of the final votes of each member of the Board in every agency proceeding; and (iv) a current index of final opinions and orders made in the adjudication of cases.

* * *

(d) Subject to the provisions of §§ 102.31

(c) and 102.66(c)[1], all files, documents, reports, memoranda, and records of the agency, falling within the exemptions specified in 5 U.S.C. section 552(b), shall not be made available for inspection or copying, unless specifically permitted by the Board, its chairman, or its general counsel.

* * *

Sec. 102.118 Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony. —

(a) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D. C., and in control

[1] Section 102.31(c) provides the Board may, with the Attorney General's approval, order an individual to testify or provide other information in a Board proceeding if in the Board's opinion such is necessary in the public interest and if such individual invokes the privilege against self-incrimination. Section 102.66(c) sets forth the procedure for the issuance of Board subpenas.

of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D. C., and in the control of the general counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpena, or otherwise, without the written consent of the Board or the chairman of the Board if the person is in Washington, D.C., and subject to the supervision or control of the Board; or of the general counsel if the person is in a regional office of the agency or is in Washington, D. C., and subject to the supervision or control of the general counsel. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as

the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

(b)(1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge *in camera*. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, al-

though not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholding, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness.

(c) The provisions of subsection (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to section 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under subsection (b) of this section shall be exercised by the hearing officer presiding.

(d) The term "statement" as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

APPENDIX B

APPENDIX B

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM 78-4 January 27, 1978

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Disclosure of Factual Information in Backpay Proceedings

For some time we have been reexamining our policy with respect to disclosure of factual information to respondents in backpay cases.

We have concluded that our current guidelines in backpay cases may be more restrictive than necessary and that broader disclosure in these cases would be beneficial to the resolution of backpay disputes.

Accordingly, the Manual provisions set forth below which provide for fuller disclosure of factual information to respondents in backpay proceedings are effective immediately.

10663 *Disclosure of Factual Information Relevant to the Compilations.* It is the policy of the Board that, upon request made by the respondent after the issuance of the backpay specification, or of the notice of hearing without specification, factual information in documents obtained or

prepared by the Regional Office which is relevant to the computation of the net backpay, including search for employment or availability for employment, or other forms of reimbursement, shall be made available.

10663.1 *Scope of Disclosure.* The disclosure policy extends only to factual information contained in documents in the possession of the Regional Office. The standard of disclosure is all such information relevant to the computation of the net backpay or to other items of reimbursement or restitution. Under that standard disclosure should be made of the documents supporting such computations. All affidavits or other documents concerning discriminatee interim employment, search for employment or availability for employment should be made available for inspection and copying. As the disclosure policy pertains only to backpay or related computations, it does not require disclosure of information relating to other issues, such as successor employer, joint employer or *alter ego.*

10663.3 *Time and Form of Disclosure.* Disclosure prior to issuance of a notice of hearing with backpay specification, or of a notice of hearing without specification, is not required. Requests for disclosure prior thereto should be refused, unless the Regional Director determines that disclosure in advance of issuance of a notice of hearing of that information, which would be available to respondent upon request after issuance of a notice of hearing, will significantly enhance possibilities of settlement. The disclosure obliga-

tion will normally be satisfied by making the materials available for inspection and copying. It should be made clear to persons requesting the information that it is not routine public information, and that it is to be supplied only for use in the proceeding.

10663.2 *Materials Which Need Not be Disclosed.* Since the policy extends only to factual information relevant to the computation of net backpay, disclosure is not required to the extent documents contain information reflecting (1) deliberative or policy making processes of the Agency, (2) the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, or other information which would not normally be available to a party in private litigation, (3) the identification of confidential sources of information to the Agency, or (4) intimate details of a personal nature having only slight relevance to the backpay inquiry.

If you have any questions concerning application or implementation, contact your Assistant General Counsel.

J.E.D.

Distribution:
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MEMORANDUM 78-4

APPENDIX C

APPENDIX C

Excerpt from the November 2, 1977 Report of the Governmental Information and Individual Rights Subcommittee; Report 95-793, 95th Congress, 1st Session (G.P.O. 1977):

THE FREEDOM OF INFORMATION ACT

Legislative Background

In 1958 Congress enacted a law, introduced in the House by Congressman John Moss and in the Senate by Senator Thomas Hennings, to correct the abuse of the Government's 180-year-old "housekeeping" statute. The Moss-Hennings bill stated that the provisions of the 1789 statute, which permitted department heads to regulate the storage and use of government records, did not authorize withholding information or records from the public. This law produced some improvement with respect to the accessibility of Federal records, but the results were far from dramatic. Most agencies continued to operate in accordance with provisions of section 3 of the Administrative Procedure Act of 1946. This act was considered by many to encourage withholding rather than disclosure. Among other things, it authorized agencies to keep information secret "for good cause found", or where secrecy was in "the public interest", or where the information had a bearing on "any matter relating solely to the internal management of an agency". In addition, an agency was required to furnish information only to "persons properly and directly concerned".

It was not until 1966 that Congress enacted comprehensive legislation to deal with the problem of government secrecy. The Freedom of Information Act of 1966 was milestone legislation that reversed long-standing government information practices. Enacted as an amendment to section 3 of the Administrative Procedure Act, it replaced the vague and general language of that law, and made it clear that it was Congress' intent that "any person" should have access to identifiable records without having to demonstrate a need or even a reason. The burden of proof for withholding information, moreover, was placed on the government. The act also broadened the scope of information available to the public and provided judicial remedies for those wrongfully denied information.

Despite the substantial shift in emphasis brought about by the 1966 Act, some government agencies responded slowly and reluctantly to requests made under the law. In 1972 the House Foreign Operations and Government Information Subcommittee held 14 days of oversight hearings relating to the administration of the FOIA by Federal agencies and concluded that the "efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy". As a result of its findings, the subcommittee proposed a number of procedural and substantive changes in the law. Two years later, Congress adopted amendments to the 1966 Act over the veto of President Ford. They became law in February 1975.

The 1974 amendments were designed to speed and ease the process of obtaining access to government files. Among other things, they required agencies to publish comprehensive indexes for the administrative processing of requests for information, required that agency fees for locating and copying records be uniform and moderate, and shortened the Government's time for answering complaints brought into court. They also prohibited agencies from withholding entire documents, only parts of which were exempt, by requiring the release of nonexempt portions. In addition, they directed the courts to expedite consideration of FOIA cases, authorized judges to examine withheld documents and make an independent determination as to whether they should be released, and provided for the recovery of attorney fees by requesters who prevailed in litigation.

Supreme Court, U. S.
FILED
APR 21 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

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IN THE

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On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF THE *AMICUS CURIAE*

The Freedom of Information Clearinghouse is a non-profit organization which was founded in 1972 to assist members of the public and the press in the effective use of laws granting a right of access to government-held information. Created out of a philosophy that a democracy functions properly only when there is open government and an informed electorate, the Clearinghouse actively collects and disseminates information by mail and through speeches, conferences, articles and

testimony before Congressional Committees concerning the public's right of access. And for those persons without a significant financial stake in securing information, it is one of the few organizations to which they can turn to obtain experienced legal assistance to pursue their right of access in court.

The Clearinghouse is appearing as *amicus curiae* in this case, with the written consents of the parties, because we believe that this Court's decision may have an impact far beyond the resolution of the narrow controversy presented here. The Court has been asked to address the scope of the investigatory records exemption to the Freedom of Information Act ("FOIA") in a context that undeniably raises legitimate law enforcement concerns: there is a pending unfair labor practice proceeding in which the subject of the proceeding is seeking prehearing access to the statements of those witnesses who will testify in support of the government's case in chief. We are troubled, however, by the fact that the petitioner National Labor Relations Board ("NLRB") urges the Court to adopt the position that, because of the sensitive nature of the employer-employee relationship, all witness statements are *per se* protected from prehearing disclosure, without requiring the Board to distinguish between the statements of employees and others, and without requiring any proof whatsoever that disclosure would interfere with a particular enforcement proceeding in some specific way. Because all law enforcement investigations and proceedings raise special considerations that are unique to the law enforcement responsibilities of the agency involved, whether it be the NLRB, the Securities and Exchange Commission, or the Federal Bureau of Investigation, the Clearinghouse is concerned that the adoption of *per se* protections here will

have a profound, adverse effect upon the public's right of access to documents in a variety of other areas.

Moreover, while an FOIA case brought for discovery purposes surely presents a different set of problems from one in which the Act has been invoked by a concerned citizen or member of the press seeking records of historical or newsworthy interest, acceptance of the view that exemption 7(A) provides blanket protection to whole categories of investigatory records without proof of specific "interference" cannot, we submit, be confined to cases of just the former type, but would undermine the public's right to know in the latter cases as well. *See, e.g., Baldwin v. Finney,* Civil Action No. 75-1221 (D.D.C., Orders of October 8, 1975 and January 13, 1976), *vacated as moot and remanded,* Nos. 76-1182, 76-1186, 77-1237 (D.C. Cir., December 8, 1977). In that case, the district court interpreted exemption 7(A) to afford blanket protection to all so-called "open" files. The court thus permitted the withholding of virtually all records relating to the investigation of former Vice-President Spiro Agnew which led to his no-contest plea to tax evasion charges in 1973, without any showing that disclosure of these particular records would adversely affect any concrete and pending law enforcement investigation or proceeding. *See also National Public Radio v. Bell,* 431 F. Supp. 509 (D.D.C. 1977), *vacated as moot,* No. 77-1419 (D.C. Cir., September 29, 1977) (records relating to an inactive FBI investigation into the death of Karen Silkwood are exempt in their entirety solely because of the "possibility" that law enforcement efforts will continue in the future); *Ditlow v. Brinegar,* 494 F.2d 1073 (D.C. Cir.), *cert. denied,* 419 U.S. 974 (1974) (discussed *infra* at p. 8).

It is *amicus'* view that any interpretation of exemption 7(A) which would relieve the government of its burden of demonstrating that disclosure in a particular case is likely to result in one of the harms enumerated by Congress would nullify the requirement embodied in the 1974 amendments that nondisclosure be permitted "only to the extent that . . . production . . . would interfere" with the government's law enforcement efforts. As demonstrated below, the sensitive relationship which exists between employer and employee may well be relevant to whether there is interference in a particular unfair labor practice case, but it cannot serve as a total substitute for the requisite particularized showing. We believe that the courts are equipped to make determinations sufficient to provide adequate protection to particular unfair labor practice proceedings without creating a special exemption – which is a legislative function – and without adopting a broad interpretation of exemption 7(A) that would serve to undermine Congress' purpose in informing the public about the investigatory activities of the Executive branch.

STATEMENT

This case arose out of a request by Robbins Tire Company under the Freedom of Information Act, 5 U.S.C. § 552, to inspect and copy, at least seven days prior to the start of a pending representation and unfair labor practice proceeding, all statements contained in the NLRB's files by those witnesses whom the Board intends to call at the hearing (App. 37-38). The Board denied this request in its entirety on the grounds that prehearing disclosure would "interfere with law enforcement proceedings," 5 U.S.C.

§ 552(b)(7)(A).[1] In support of its position, the Board contends that it is unnecessary to distinguish between statements by those who are present employees, as opposed to former employees of Robbins Tire, and it has not even indicated how many of those whose statements are sought were never Robbins employees at all. The Board simply argues that, given "the peculiar character of labor litigation," it should be presumed in each case that pre-hearing disclosure of any witness statement or affidavit would "necessarily" interfere with the Board's enforcement proceedings (Pet. Br. at 31).[2]

---

[1] Exemption 7 in its entirety permits the withholding of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

[2] The Board alternatively argues that these statements are exempt in their entirety under 5 U.S.C. § 552(b)(5) as attorney work product. In urging affirmance of the court of appeals' decision, *amicus* will address only the question of whether disclosure of these records would "interfere" with the Board's unfair labor practice proceedings within the meaning of 5 U.S.C. § 552(b)(7)(A). However, *amicus* believes that the Board's exemption 5 argument seeks an unwarranted reversal of a long line of cases which emphasize that a fact/opinion distinction must be made in applying that exemption. *See EPA v. Mink*, 410 U.S. 73, 89 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (4th Cir. 1977); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). We leave fuller argument concerning this issue to respondent.

The district court rejected the Board's claim, and ordered it to provide the requested statements to Robbins Tire at least five days prior to any hearing where the person making the statement or affidavit would be called as a witness (App. 65). In affirming the decision of the district court, the court of appeals concluded that the FOIA "requires disclosure absent the agency's ability to prove the applicability of exemption 7(A) in the context of the particular proceeding involved" (App. 121). The court did recognize that the exemption could be invoked if it were shown, by the presence of any of a number of factors identified by the court, that intimidation of the Board's witnesses was likely to occur in the five days between discovery and the hearing (App. 120). It concluded, however, that the Board's *per se* approach to exemption 7(A) – which essentially argues that the potential for intimidation should be presumed to be so great in every case as to require nondisclosure of all statements and affidavits – is inconsistent with the legislative history of the 1974 amendments to the FOIA, which reveals that Congress amended exemption 7(A) for the specific purpose of requiring the government to demonstrate how disclosure would cause tangible harm to a particular enforcement proceeding in order to justify withholding.

ARGUMENT

ABSENT PROOF OF THE LIKELIHOOD OF INTIMIDATION OF WITNESSES IN A PARTICULAR UNFAIR LABOR PRACTICE PROCEEDING, WITNESS STATEMENTS ARE NOT *PER SE* PROTECTED FROM PREHEARING DISCLOSURE.

Emphasizing that disclosure is the dominant purpose of the Freedom of Information Act and that the exemptions

are to be narrowly construed, *Department of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976), the court below concluded that, absent the Board's showing that disclosure would "interfere" with the particular unfair labor practice proceeding involved, the FOIA requires disclosure of the witness statements at issue. We urge that the court's rejection of the *per se* approach presented by the Board is not only entirely consistent with, but is affirmatively compelled by, both the language and the legislative history of the 1974 amendments to exemption 7 of the FOIA.

A. The 1974 Amendments to Exemption 7 Specifically Require Disclosure Absent a Particularized Showing of Harm to a Concrete Law Enforcement Proceeding.

As originally enacted, the FOIA exempted from mandatory disclosure all "investigatory *files* compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 80 Stat. 251 (emphasis added). The early cases which interpreted this exemption applied a "harm" analysis, asking whether disclosure of particular documents would actually impede law enforcement efforts by revealing the identity of confidential informants, by exposing secret investigative techniques, or by interfering with enforcement proceedings in some specific way. *See, e.g., Bristol-Myers Company v. FTC*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Wellford v. Hardin*, 444 F.2d 21, 23-24 (4th Cir. 1971). In 1973, however, in what was viewed as a particularly sensitive case concerning FBI records of the investigation of the assassination of President Kennedy, the District of Columbia Circuit departed from prior precedent and held that exemption 7 was applicable *per se*

so long as the requested records were contained in a properly designated "investigatory file." *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) *(en banc)*, *cert. denied*, 416 U.S. 993 (1974). *See also Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.) *(per curiam)*, *cert. denied*, 419 U.S. 974 (1974) (in which *Weisberg* was extended to provide blanket protection to files of the National Highway Traffic Safety Administration relating to automobile safety defect investigations); *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) (agency investigatory files concerning public school discrimination practices held *per se* exempt); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973) (army report of the My Lai incident was "compiled for law enforcement purposes" and was thus declared nondisclosable). These cases, which were criticized for "woodenly and mechanically" applying exemption 7 without regard to whether it could be shown that disclosure would adversely affect law enforcement proceedings, were specifically overruled in the 1974 amendments to the FOIA.[3]

Senator Philip A. Hart, who offered the amendment to exemption 7 which was adopted on the Senate floor, explained that the Freedom of Information Act was designed to "provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality." Source Book at 334. Senator Hart

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[3] Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (1975) ("Source Book") at 335 (remarks of Senator Kennedy), 349 (colloquy between Senators Kennedy and Hart).

pointed out that those court decisions which had afforded blanket protection to all records contained in an investigatory file had strayed from this basic purpose by failing to require that the government bear its burden of demonstrating that disclosure would harm one of the interests specifically protected by Congress. As Senator Hart noted:

> The [courts] would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
>
> That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. [Source Book at 332-333]

In order to give effect to Congress' original intent, the first element of Senator Hart's amendment substitutes the term "records" for "files," indicating that courts should examine the particular document at issue, and not the repository for it, in order to determine if nondisclosure is warranted. *Id.* at 332. Most importantly, the amendment also "explicitly places the burden of justifying nondisclosure on the Government," which, in order to invoke the exemption, must show that disclosure of a particular investigatory record would cause one of six enumerated harms, including "interfere[nce] with enforcement proceedings." *Id.* at 333; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975). Finally, with respect to the showing required in determining whether or not disclosure will interfere with a law enforcement proceeding, Senator Hart emphasized that *"it is only relevant to make [an exemption 7A] determination in the context of the particular enforcement proceeding."* Source Book at 333 (emphasis added).

While some courts have suggested that this amendment was designed only to require the disclosure of investigatory records contained in closed files, *see Title Guarantee Co. v. NLRB*, 534 F.2d 484, 490-91 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976), the legislative history indicates that Congress specifically considered and rejected any broad open/closed file dichotomy. First, Senator Hart adopted the present language of the amendment from a proposal drafted by a Committee of the American Bar Association, specifically rejecting the approach suggested by Attorney General Elliot Richardson. Under the Justice Department proposal, broad protection for investigatory *files* would have remained but "only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated. . . ." Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary, United States Senate, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 93d Cong., 1st Sess. (Vol. II) at 227 (1973). While this proposal was included in the record during Senate debate, Source Book at 339, it was ultimately rejected in favor of the language proposed by Senator Hart. Moreover, if Senator Hart had intended his amendment to apply only to closed investigatory files, it would have been unnecessary for him to state that the amendment he proposed was intended to overrule *Ditlow v. Brinegar*, *supra*, and *Center for National Policy Review v. Weinberger*, *supra*, which had applied blanket protections to "open" and "pending" files. *See* Source Book at 349. While it is clear that records in a closed file will rarely if ever meet the test of interference, the converse – that material in an open file need not meet that test – was not adopted by Congress in the 1974 amendments.

The legislative history thus reveals a major reform of the investigatory records exemption to require an inquiry in each case as to whether disclosure would cause one of the harms specifically enumerated by Congress. As the court of appeals recognized below, this requirement is consistent with the purpose of all of the 1974 amendments, which were designed to make it "clear that there can be no blanket claim of confidentiality under any of the exemptions." App. 112, *quoting* Source Book at 293 (remarks of Senator Kennedy).

B. Despite the Potential for Intimidation in Labor Cases, Interference Cannot be Presumed Without A Particularized Showing in Each Case.

Without addressing the fact that the 1974 amendments were specifically designed to require an agency to show why disclosure of a "particular document should not be made," *supra* at p. 9, the Board primarily argues that, in amending exemption 7, Congress did not express any intent to override the strict limitations on discovery in unfair labor practice proceedings which the Board has adopted by rule. The NLRB claims to find support for its position in the only portion of Senator Hart's remarks which addresses the kind of substantive interference that would justify withholding under the new language of the exemption. Senator Hart stated that:

> [Exemption 7(A)] would apply whenever the Government's case in court – a concrete, prospective law enforcement proceeding – would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure

> of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. [Source Book at 333.]

In support of its discovery argument, the Board reads Senator Hart's first reference to a general concern about "premature" disclosure, in conjunction with his recognition of a statement in the 1966 House Report that the original purpose of the provision was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have." Source Book at 332, *quoting from* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). On the basis of this language, the NLRB concludes that "[s]ince the pre-hearing release of Board witness statements under the FOIA would give a person 'earlier' and 'greater access' to those statements than 'he would have directly' in agency proceedings, where they would not be available until after the witness had testified," the policy underlying the original exemption 7, which according to the Board remains unaffected by the subsequent amendment, requires without more that such statements be exempt from disclosure (Pet. Br. at 24).

In rejecting this mechanical "comparative discovery" test, the court of appeals noted, *inter alia*, that the Board's argument is entirely inconsistent with Senator Hart's emphasis that withholding under exemption 7(A) be justified on a case-by-case basis (App. 115). However, the Board's assertion that the FOIA is subservient to discovery rules, which vary from agency to agency, cannot be sustained for a further reason. It is well-established that the exemptions embodied in the FOIA were designed to reflect "*congressional* determination[s] of the types of information that the

Executive branch must have the option to keep confidential, if it so chooses." *EPA v. Mink*, 410 U.S. 73, 80 (1973) (emphasis added); *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976); *American Jewish Congress v. Kreps*, __F.2d__, Civil Action No. 76-1559 (D.C. Cir., March 15, 1978), Slip op. at 9 n.34 ("A central aim of the Freedom of Information Act has been to substitute legislative judgment for administrative discretion"). Thus, the fact that the Board has exercised its discretion in not providing for prehearing discovery by rule has no bearing whatever on whether it has adequately fulfilled the specific Congressional requirement under the FOIA of demonstrating that prehearing disclosure of witness statements would be likely to cause actual harm in a particular unfair labor practice case. Surely, the Board's discovery rules regarding witness statements and affidavits do not make such statements "specifically exempted from disclosure by statute" within the meaning of exemption 3, by virtue of the fact that the National Labor Relations Act empowers the Board to make "such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.[4] *See* Pet. Br. at 14-15.

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[4] Exemption 3 of the FOIA, which was the subject of Congress' most recent amendment to the Act, provides that documents may be withheld if they are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1247 (1976) (the Government in the Sunshine Act). As the D.C Circuit recently recognized in *American Jewish Congress v. Kreps, supra*, this amendment was designed to overrule the decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975): "[t]he legislative response was a narrowing of Exemp-

(continued)

The Board's argument, in effect, attempts to avoid the necessity of making a particularized showing of harm under exemption 7(A) by elevating its agency discovery rules to the equivalent of a (b)(3) statute, which is the only recognized authority under the FOIA upon which a categorical claim for withholding can be made. The Board cannot succeed in this effort. *See American Jewish Congress v. Kreps, supra.* Indeed, it is ironic that, under the Board's approach, requesters of information are somehow worse off because the Board has exercised its discretion to provide disclosure of some material through discovery than they would be if the Board had no discovery rules at all. The court of appeals was therefore correct in its conclusion that "the protection against interference involves a focus not on the [discovery] rights of the individual FOIA plaintiff but rather on the problems posed to the particular agency proceeding" (App. 116).

As further support for its position, the Board asserts that "[t]he labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case. . . ." Pet. Br. at 34, *citing Climax Molybdenum Co. v. NLRB*, 539 F.2d 63, 65 (10th Cir. 1976). The Board argues that this intimidation can result in the second type of interference identified by Senator Hart, where disclosure would result in a reduced ability to collect investigatory information (*supra*, at 11-12). The Board argues that "pre-trial disclosure

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[4] (continued) tion 3 to exclude from its compass laws such as that in *Robertson*, which Congress perceived as giving the agency *'cart blanche'* to withhold any information [it] pleases." Slip. op. at 7, *citing* H.R. Rep. No. 880, Pt I, 94th Cong., 2d Sess. at 23 (1976).

of statements and affidavits would have a 'retarding effect on open and frank Board investigations of alleged unfair labor practices'," since "employees who are interviewed may be reluctant for fear of incurring employer displeasure, to have it known that they have given information." Pet. Br. at 34-35, *citing Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1142 (9th Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 491 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). In this case, the court of appeals rejected these wholesale claims of injury for two reasons: first, "we do not know which of the affiants here are employees," and second, a "sweeping assumption of intimidation is inappropriate" where, as here, the request is limited to statements of witnesses scheduled shortly to appear at a hearing, especially since the Board will make these statements available after the witnesses take the stand (App. 118-119).

It is also significant, however, that the legislative history of the 1974 Amendments reveals that an argument analogous to that advanced by the Board was made during the Senate debates by those seeking to assure blanket protection for the investigatory files of the FBI. Senator Roman Hruska stated his view that the reforms envisioned by the Hart amendment would cause "the sources for FBI information [to] dry up" due to the fear by potential informants of coercion or retaliation if their statements were to become known:

> The passage of [Senator Hart's] proposed amendment would undoubtedly have the effect of inhibiting FBI informants and citizens from coming forth to offer vital bits of information to the FBI. They will no longer feel confident that

> their names will remain secret from public scrutiny, possibly subjecting them to embarrassment and/or reprisals. The net result will be a crippling effect on the FBI's ability to garner information and obtain successful prosecution in criminal cases.

Source Book at 340, 341. *See also id.* at 348 (where Senator Hruska emphasized the potential for coercion in the organized crime area). Senator Edward Kennedy, the principal author of the remaining 1974 amendments, answered Senator Hruska's concerns with the assurance that the amendment proposed by Senator Hart would indeed protect against such specific harms to law enforcement efforts. He added, however, that the "thrust of the amendment" was to require federal agencies "to be *specific* about safeguarding the legitimate investigations that would be conducted. . . ." Source Book at 349 (emphasis added).[5]

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[5] The Board's complaint that disclosure will have a possible chilling effect on the willingness of witnesses to provide information in future investigations is a problem specifically addressed by Congress in exemption 7(D). The Board obviously recognizes, however, that the Act's protections for confidential informants do not apply in cases where, as here, sources have agreed to have their identities disclosed at the hearing. *See* H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974). In addition, since unfair labor practice proceedings are civil in nature, Congress indicated that the Board could never withhold such statements in their entirety under this rationale, but only the names of informants and other identifying details. *Id.*, 5 U.S.C. § 552(b)(7)(D). The Board should not be permitted to avoid Congress' determination as to the extent of protection to be afforded agency sources by stretching exemption 7(A) to cover information that Congress refused to protect under exemption 7(D).

In short, both the language and the legislative history of the 1974 amendments to exemption 7 demonstrate Congress' explicit disapproval of any blanket exemption for classes or categories of investigatory records. We submit that these reforms came about because actual experience had demonstrated how *per se* nondisclosure rules were capable of completely subsuming the public's right to know about the law enforcement activities of the government. Indeed, even in the NLRB context, experience has already shown the difficulty that courts have encountered in limiting the reach of the Board's *per se* approach to exemption of its investigatory files. Courts which have accepted the Board's argument that the potential for employer intimidation of employees is so great in every case as to relieve the Board of its obligation to specifically justify nondisclosure of employee affidavits have also extended boiler plate exemption 7(A) protection to statements by non-employees, *Title Guarantee Company v. NLRB, supra; New England Medical Center Hospital v. NLRB*, 548 F.2d 377, 382-83 (1st Cir. 1976); *but see Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1143 (9th Cir. 1976), as well as to statements in closed files which may have some conceivable relation to pending cases, *New England Medical Center Hospital v. NLRB, supra*, 548 F.2d at 386. Moreover, while one circuit has rejected the Board's efforts to withhold statements obtained in an unfair labor practice investigation that ended in a decision not to issue a complaint, since there were "*no* enforcement proceedings pending [and none] contemplated . . .," *Poss v. NLRB*, 565 F.2d 654, 657 (10th Cir. 1977), the Board continues to advance the position before this Court that such statements should be protected from disclosure even in the absence of a particularized showing of harm (Pet. Br. at 33 n.17).

We do not argue, however, that the courts should ignore the context in which unfair labor practice proceedings arise in making an exemption 7(A) determination in a particular case. We fully agree with the court of appeals' recognition that exemption 7(A) would be available where a showing has been made by the NLRB that intimidation of witnesses was likely to occur during the five days between discovery and a particular Board hearing (App. 120). Indeed, evidence of the potential for coercion in a particular industry or in the context of a particular type of dispute may be introduced to support the Board's argument that witness statements are entitled to protection in certain unfair labor practice cases. The Board must nevertheless be required to make a particularized showing of interference sufficient to insure that no material is withheld beyond that afforded protection by Congress.

In this regard, the court of appeals identified numerous factors that bear upon such an inquiry in Board proceedings:

> whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give. *See Temple-Eastex, Inc. v. NLRB*, 410 F. Supp. 183 (E.D. Tex., 1976) (ordering disclosure of witness statements favorable to employer) [App. 120].

See also Local 30, United States Tile and Composition Roofers v. NLRB, 408 F. Supp. 520 (E.D. Pa. 1976) (a sufficient showing of a substantial danger of intimidation was made where the charges at issue concerned repeated acts of violence). This approach, by conforming with Congressional intent that the circumstances of each case be examined, will make it possible to distinguish between those records that may be released and those which, if disclosed, will actually compromise the Board's valid law enforcement interests. *See, e.g., Charlotte-Mecklenberg Hospital Authority v. Perry*, Nos. 76-2272 and 76-2273 (4th Cir., January 26, 1978) (in which the court found that the potential for intimidation in an employment discrimination case brought by the EEOC had been sufficiently demonstrated to justify the pre-hearing withholding of statements by present employees, but not the statements of persons no longer employed by the company). While the Board argues that such a case-by-case approach is a task for which the courts are ill-equipped, and that application of the requirements of the FOIA in unfair labor practice proceedings would be likely to result in delay (Pet. Br. at 40-43), we simply suggest that, in light of the legislative history of the 1974 amendments, such arguments for a wholesale exemption for NLRB files must be made to Congress and not to this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ROBBINS TIRE AND RUBBER COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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IN THE

Supreme Court of the United States

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ROBBINS TIRE AND RUBBER COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 73,000 enterprises and organizations, including chambers of commerce and trade associations, representing businessmen and women throughout the United States. Over 69,000 corporations, partnerships, proprietorships, and individuals engaged in professions are direct business members of the National Chamber; and 83 percent of the members are small businesses, each employing 100

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* Pursuant to Rule 42, all parties have granted permission for the filing of this brief *amicus curiae*.

or fewer employees. The Chamber regularly represents its members' interest in a broad spectrum of matters of critical importance to the business community, including participation as an *amicus curiae* in cases before this Court.[1]

The questions presented in this case, whether witness statements given to the National Labor Relations Board are exempt from disclosure pursuant to exemptions 7 and 5 of the Freedom of Information Act, as amended,[2] is a matter of vital concern to the Chamber and its members. The Chamber has supported the principles of the Freedom of Information Act (FOIA) since its inception.[3] Moreover, the issue presented here is not new to the Chamber in view of its participation in *Title Guarantee Insurance Co.* v. *National Labor Relations Board,* 534 F.2d 484 (2nd Cir.), cert. denied,

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[1] *E.g., United States* v. *United States Gypsum Co.,* No. 76-1560; *Malone* v. *White Motor Corp.,* No. 76-1184; *New York Telephone Co.* v. *New York,* No. 77-961; *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100,* 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America,* 414 U.S. 268 (1974); *NLRB* v. *Sears Roebuck & Co.,* 421 U.S. 132 (1975).

[2] 5 U.S.C. 552 *et seq.* (1976).

[3] A free flow of information from and concerning all branches of government at all levels is a right of the public and is essential to our democratic society.

• • •

Except for matters clearly affecting national security or otherwise covered by statute, all business of government should be fully disclosed to the public. The burden of proof must rest with government in every instance to justify withholding any information from the public.

From *Policy Declarations* adopted by the Chamber of Commerce of the United States, October 1975.

429 U.S. 834 (1976); and related FOIA cases, *NLRB* v. *Sears Roebuck, supra.; Automobile Club of Missouri* v. *NLRB,* 84 LRRM 2423 (D.C. Cir.).

The arguments put forth by the Board for reversing the decision below would, if adopted by this Court, result in a substantial interference with the intent of Congress in adopting the 1974 amendments to the Freedom of Information Act, and a return to the "wooden and mechanical standards" of applying FOIA exemptions which existed prior to the 1974 amendments. *McDonnell Douglas Corp.* v. *National Labor Relations Board,* unofficially reported at 92 LRRM 2072, 2074 (C.D. Ca. 1976). Accordingly, the Chamber submits this brief *amicus curiae* in support of affirmance of the decision of the U.S. Court of Appeals for the Fifth Circuit below.

SUMMARY OF ARGUMENT

The District Court and Court of Appeals below, in response to Robbins Tire and Rubber Company's (hereafter "Robbins") FOIA request of the Board for statements of witnesses to be called to testify at an unfair labor practices hearing, ordered the Board to turn over those statements to Robbins five days prior to the hearing. (A-108-109, 129.)[4] The issues presented are whether exemptions 7 or 5 of the FOIA allow the Board to withhold those statements.[5]

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[4] "A" references are to the Appendix filed with this Court.

[5] As discussed *infra,* the Board's own rules apply a Jencks Act, 18 U.S.C. § 3500(a) (1970), type of procedure to Board proceedings, thereby requiring that all witness statements be turned over to the party after the witness has testified for the Board. Thus, the issue is not whether the documents are to be made available to Robbins, but when. *See* A-64.

The position of the Board that the statements can be withheld is totally unsupported by the basic policy of the Freedom of Information Act, which is to encourage disclosure. That policy is plainly evidenced by the legislative history of the Act, particularly the history of the 1974 amendments. That history also clearly indicates that the burden of proving the applicability of an exemption is on the administrative agency; a burden the Board has not met here. Moreover, the Board's "parade of horribles," which will occur if it must turn over these statements, are totally unsupported in either the record or logic. This conclusion is buttressed by the fact that the Board's own rules require the statements be turned over after the witness has testified. 29 C.F.R. 102.118(b)(1). Finally, there can be no question that the courts have the right to make an *in camera* inspection of the disputed documents as well as a *de novo* determination as to whether the claimed exemptions apply. At the very least, the court must balance the competing interests in determining whether disclosure should be allowed.

Disclosure of the witness statements five days earlier than Board rules allow, as ordered by the court below, would not interfere with the Board's enforcement proceeding within the meaning of Exemption 7. It is equally clear that the witness statements are not "inter-agency or intra-agency memorandums or letters" within the meaning of Exemption 5. Accordingly, the decision below should be affirmed.

ARGUMENT

The Legislative History Provides the Basis for Rejection of the Board's Contentions.

The legislative history of FOIA, and in particular the 1974 amendments, demonstrates the strong Congressional policy in favor of disclosure. In light of this policy, it becomes difficult to accept the Board's narrow reading of the Act's disclosure requirements and the Board's broad reading of the Act's exemptions. Prior to 1966 when the Freedom of Information Act was passed, the sole statutory provision providing for public disclosure of agency information was section 3 of the Administrative Procedure Act. 5 U.S.C. § 1002 (1964 ed.). However, these disclosure provisions were vague and contained numerous loopholes upon which the agencies consistently relied.* It is not surprising, therefore, that "Section 3 was generally recognized as falling far short of its disclosure goals and had come to be looked upon more as a withholding statute" (citations omitted). ***Environmental Protection Agency v. Mink***, 410 U.S. 73, 79 (1973).

In response to widespread public displeasure over government secrecy and demands for more open government, Congress amended the Administrative Procedure Act in 1966 by passing the Freedom of Information Act. 80 Stat. 251. The Act greatly expanded the availability of information by making it available to "any person," and by mandating that information be released unless it met one of nine concrete exemp-

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* Section 3 stated in relevant part:

> Matters of official record shall in accordance with published rule be made available to persons propely and directly concerned except information held confidential for good cause found.

tions. *EPA* v. *Mink, supra,* at 79; *Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and other Documents,* Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975), p.3 (hereinafter, "Source Book"). "The Act reflected 'a general philosophy of full agency disclosure.'" *Department of Air Force* v. *Rose,* 425 U.S. 352, 360-361 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Moreover, the Act required reviewing courts to "determine the matter *de novo and the burden is on the agency to sustain its action.*" 5 U.S.C. § 552(a)(3) (1966) (emphasis added).

Exemption 7 of the 1966 Act provided for the nondisclosure of "investigatory files compiled for law enforcement purposes *except to the extent available by law to a party other than an agency*" (emphasis added). Despite contrary legislative history, the courts read this exemption broadly, denying various requests for both open and closed investigatory files. *See, e.g., Bristol-Myers Co.* v. *FTC,* 424 F.2d 935 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970); *Evans* v. *Department of Transportation,* 446 F.2d 821 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972); *Frankel* v. *SEC,* 460 F.2d 813 (2nd Cir.), *cert. denied,* 409 U.S. 889 (1972). *See generally,* Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery,* 8 Loyola Univ. L.J. 149-156.

Beginning in 1973, the United States Court of Appeals for the District of Columbia Circuit decided three cases in which they denied information requests through a strict interpretation of exemption 7. *Aspin* v. *Department of Defense,* 491 F.2d 24 (D.C. Cir. 1973); *Ditlow* v. *Brinegar,* 494 F.2d 1073 (D.C. Cir.) (*per curiam*), *cert. denied,* 419 U.S. 974 (1974); *Center for National Policy Review* v. *Weinberger,* 502 F.2d 370 (D.C. Cir. 1974). The approach taken in these cases was later criticized by Congress as a "stone wall" and "wooden and mechanical."[1] In *Ditlow,* the District of Columbia Circuit demonstrated this approach:

> [I]f the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes,' the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case. 494 F.2d at 1074.

As one commentator has stated:

> Such literal readings of the investigatory files exemption ignored both the reasons behind the exemption and the interests in favor of disclosure. The courts had fashioned a mechanical test from the literal language of the statute and thereby reduced the relevant scope of inquiry to a finding that materials sought were within or beyond the scope of the ambit of the exemption.

Backdooring the NLRB, supra at 155.

These decisions finally forced Congress to clarify the intended scope of the Act and exemption 7 in particular. *McDonnell Douglas Corp.* v. *NLRB, supra* unofficially reported at 92 LRRM 2072, 2074.

In doing so, Congress plainly stated that the decisions broadly construing exemption 7 and using a mechanical approach were contrary to the intent of Congress

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[1] 120 Cong. Rec. S. 9329-30 (Senator Hart) and S. 9331 (Senator Kennedy), May 30, 1974.

[S. Rep. No. 854, 93rd Cong., 2nd Sess. 6 (1974) and that the amendments were designed to overrule *Aspin, Ditlow* and *National Center*. (Source Book at 349.)

Exemption 7(a) was reworded as follows:

> (b) This section does not apply to matters that are
>
> (7) investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would
>
> (A) interfere with enforcement proceedings.

In addition to rewording exemption 7, Congress provided for the use of *in camera* inspections of disputed documents thereby permitting the reviewing court to make a *de novo* determination. 5 U.S.C. 552(a)(4)(B).[8] Moreover, Congress continued the requirement that the agency relying on an exemption had the burden of proving its applicability.[9] Thus, Congress in-

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[8] 5 U.S.C. 552(a)(4)(B) (1976) provides in relevant part:

> In such a case the court shall determine the matter *de novo* and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (h) of this section, and the burden is on the agency to sustain its action.

[9] Id.

One comentator has summarized the changes which are particularly applicable here:

> First, Congress sought to exclude as a basis for exemption generalized assertions that confidential sources or investigative procedures would be compromised. Second, it changed the focus of the inquiry from a broad view of 'investigatory files' to a narrower concern with particular 'investigatory records.'

tended for the amended Act to provide for the fullest possible disclosure with the exemptions interpreted strictly. *Department of Air Force* v. *Rose, supra* at 360-361, 366.

The Board Has Failed to Prove that Release of the Witness Statements Would Interfere with the NLRB Proceeding.

The Board conveniently ignores the statutory requirements that exemptions be determined on a case-by-case basis with a reviewing court making a *de novo* determination.[10] As Senator Hart stated during the debates:

> Our amendment is broadly written and when any one of the reasons for nondisclosure is met, the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes. Source Book 332-333.

Recognition of this legislative intent has been evidenced by a recent opinion of the Court of Appeals for the Fourth Circuit:

> It is manifest from this legislative history that Congress intended to proscribe the use of a mechanical test such as that enunciated in *Title Guarantee* in favor of 'a case-by-case' factual inquiry in determining whether to require disclosure of

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> Third, it emphasized that the 'Government . . . would have to *show* that disclosure *would* result in a specified statutory harm. This makes the burden of proof provisions of amended section 552(a)(4)(B) applicable to exemption 7.

Backdooring the NLRB, supra at 162.

[10] *See Charlotte Mecklenburg Hospital Authority* v. *Perry*, C.A. 4, Nos. 76-2272 and 2273, Jan. 26, 1978, unofficially reported at 16 FEP Cases 680, 685; *Title Guarantee Insurance Corp.* v. *NLRB*, 407 F. Supp. 498, 504 (1975), rev'd 534 F.2d 484 (2nd Cir. 1976).

investigatory records. *Charlotte-Mecklenburg Hospital Authority* v. *Perry,* C.A. 4, Nos. 76-2272 and 2273, Jan. 26, 1978, unofficially reported at 16 FEP Cases 680, 685.[11]

Here, the assertions of the Board ignore each and every change that Congress made in the FOIA.[12]

In the first instance, the Board incredibly has attempted to wrap its obstanate behavior in the cloak of Congressional intent, which expression of the will of Congress, as discussed above, is contrary to the Board's position. As Judge Hancock noted below:

> It is important to note that the Board does not claim that there is something unusual about the affidavits or statements, or that there is something within them that would cause them to be anything other than an average statement obtained during a routine investigation. *The Board's attorney stated* during the oral hearing on April 15, 1976, *that, for the purposes of deciding this case, the court could assume that the Board's position is predicated simply upon the fact that the statements were obtained in connection with a pending matter* (A-62) (emphasis added).

Thus, the Board contends that all witness statements are automatically exempt in all proceedings without regard to the Board's ability to establish in *that particular proceeding* that interference with the enforcement proceeding would occur.

In this regard, the Board makes generalized assertions of interference without presenting a scintilla of evidence that such interference would take place in this proceeding. *See, McDonnell Douglas Corp.* v. *NLRB, supra* at 2074. It has not even submitted the statements to the court for an *in camera* inspection so that, at the very least, the court could determine if any portion of the statements are favorable to Robbins.

In this regard, the Board argues strenuously that release of the witness statements five (5) days prior to the hearing would result in intimidation or harassment of witnesses (Bds. br. 13-15, 25). This contention impermissably reverses the burden of proof from that required in the statute. By requiring Robbins to prove that they would not interfere with the proceeding (*i.e.,* the witnesses), the Board has attempted to shed itself of the burden of proving that *Robbins would* interfere with the proceeding. Furthermore, the Board suggests that this Court must presume *in the absence of any evidence* that Robbins will violate Section 8(a)(4) of the National Labor Relations Act,[13] as interpreted by this Court in *NLRB* v. *Scrivener,* 405 U.S. 117. We suggest that in the absence of evidence to the contrary, it must be presumed that citizens obey laws rather than violate them.

Furthermore, we suggest that it is unrealistic to suggest that most respondents in Board proceedings would attempt to intimidate or harass witnesses five (5) days before a hearing. Evidence of such harassment pre-

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[11] The Board states in its brief its belief that Congress, in enacting the 1974 amendments, did not intend to overrule decisions such as the Fourth Circuit's in *Wellman Industries, Inc.* v. *NLRB,* 490 F.2d 427. It is significant that in *Charlotte-Mecklenburg, supra,* the Fourth Circuit states that Congress' dissatisfaction with *Wellman,* as well as other cases, motivated Congress to rewrite exemption 7. *But see, Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1731 (C.A. 4).

[12] See Footnote 9, *supra.*

[13] 29 U.S.C. 158(a)(4) (1973).

sented at the hearing would more than likely result in the employer losing his case.

In addition, the Board continually ignores the facts that Robbins requested and the court below ordered the Board to turn over only the statements of those persons who would be witnesses at the hearing five (5) days later and that the Board's own rules require that the statements be turned over at the hearing. Thus, the Board states that "many persons [presumably in future cases] would be reluctant to volunteer information to Board investigators if they know that their names or the information they provide will be revealed . . ." (Br. p. 17). In light of the fact that under the Board's present procedures the statements would be turned over at the hearing, it is difficult to find a rational basis for the Board's fear that persons would be more reluctant to volunteer information than they presently are. See, *Goodfriend Western Corp.* v. *Fuchs,* 411 F. Supp. 454, 458 (D. Mass.), rev'd 535 F.2d 145 (1st Cir.) *cert. denied,* 45 U.S.L.W. 3306 (1976).

Similarly, the Board argues that the chilling effect of its own disclosure rule is minimized (as compared to the disclosure required by the court below) by the fact that the "majority of unfair labor practice proceedings are disposed of without hearing, and that most persons who give such statements are never called upon to testify." (Br. 17) Seemingly, the Board ignores the requirement of the court below that *only* statements of those who testify would have to be disclosed, and the statements of those who do not testify could be kept confidential.

The Board's assertions that all witness statements in its proceedings are entitled to a blanket exemption

from FOIA disclosure requirements without benefit of *in camera* inspection, ignores the fact that *in camera* inspection would reveal information highly relevant to the question of whether interference is likely to result. Cf. *Charlotte-Meckenburg Hospital Authority* v. *Perry, supra.* Thus, *in camera* inspection might reveal whether employees or others had given the statements, whether the statements are favorable or unfavorable to the employer, and in general the likelihood of retaliation, based on the contents of the statements. See *Temple-Eastex* v. *NLRB,* 410 F. Supp. 183, 186 (E.D. Tex. 1976).

Moreover, coupled with the court's examination of the statements, it could consider probative evidence of the likelihood of interference with the enforcement proceeding by that employer. Such evidence might include the respondent's past record of unfair labor practices, including whether he has previously violated section 8(a)(4) of the NLRA.[14]

The Scope of the Board's Discovery Rules Is Not Relevant to an FOIA Proceeding.

In support of its position that it does not have to disclose the witness statements, the Board places heavy reliance on its somewhat archaic discovery rules. In so doing, the Board notes that disclosure of the witness statements would give the party greater access than available under Board procedures. (Br. 24, 43.)

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[14] Of course, as discussed *supra,* the Board has the burden of proving the likelihood of interference in the particular proceeding. Where, as in this case, the Board has presented no evidence, disclosure must be ordered.

While the extent of discovery allowed by the Board's rules is admittedly almost nonexistent, the scope of those rules is irrelevant. *NLRB* v. *Sears Roebuck*, 421 U.S. 132, 143, fn. 10 (1975). The statute mandates disclosure of information "to any person." 5 U.S.C. § 552 (a)(3) (1976). In *Sears*, the employer was also the charging party in a Board proceeding at the time it filed its FOIA request. This Court stated:

> *Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest [in the requested material] greater than that shared by the average member of the public.* The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. [Citations omitted.] Accordingly, we will not refer again to Sears' underlying unfair labor practice charge. *Sears, supra.*[15]

When an exemption from disclosure under section 7 is claimed, the relevant consideration is not whether the agency would have disclosed the information prior to the advent of the Freedom of Information Act, since such an interpretation would make the Act irrelevant.

[15] In *Cessna Aircraft Co.* v. *NLRB*, 405 F. Supp. 1042, 1046, (D. Kan. 1975), rev'd 542 F.2d 834 (10th Cir. 1976), the court stated, relying on *Sears:*

> This is not an action to review decisions of the Board regarding discovery matters which may or may not arise during the hearing in controversy now before that Board. This is a separate and distinct action to enforce provisions of the Freedom of Information Act, whose benefits are available to any person. The Board cannot seriously contend that it is somehow exempt from provisions of the Act, or that its internal rules and regulations regarding discovery may apply to nullify provisions of that Act, or that plaintiff here, simply because it is engaged in litigation before the Board, is relegated to lesser status than general members of the public.

Rather, as exemption 7 states, the relevant inquiry is whether disclosure will substantially interfere with the enforcement proceeding.[16]

The Board's Reliance on Title Guarantee is Misplaced.

The Board correctly notes that the Second Circuit's decision in *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484, *cert. denied*, 429 U.S. 834 (1976) is the leading case in support of its decision.[17] Accordingly, the Board places heavy reliance on it.

However, that case is clearly distinguishable on the facts from that presented here. In *Title Guarantee*, the employer requested all written statements, signed or unsigned, without regard to whether the person giving those statements would testify at a subsequent Board hearing. *Title Guarantee* at 486. Such a request is plainly distinguishable from the one in the instant case where Robbins sought only the statements of witnesses who would testify at a hearing five (5) days later, where the statements would be turned over pursuant to the Board's own rules.

As the court below stated in distinguishing *Title Guarantee:*

> . . . Title Guarantee involved a request for copies of all statements, without regard to whether the

[16] Prior to the 1974 amendments, the availability of documents to a private litigant before the agency was a relevant concern since investigatory files were not available "except to the extent they were available by law to a private party." S. Rep. No. 813, 89th Cong., 1st Sess. § 9 (1965). However, this language was dropped when the statute was amended.

[17] The Fifth Circuit below, and the Fourth Circuit in *Charlotte-Mecklenburg, supra*, have both expressly declined to follow *Title Guarantee.*

affiants would be called to testify. Part of the rationale for denying the right to disclosure was the 'delicate relationship which exists between employer and employees.'

* * *

There is inherent in this concern an assumption that the Board would be unable to obtain testimony from employees to aid in its prosecution if their statements would become the knowledge of their employer. Even discounting the problem that we do not know which of the affiants here are employees, this sweeping assumption of intimidation is inappropriate here, where the request is limited to statements of witnesses. (A-118; citations and footnotes omitted.)

In any event, we submit that the Second Circuit's decision is incorrect and runs directly contrary to the legislative history. (A-112, 113-121.) *Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra,* at 685.

The Second Circuit applies exactly the "wooden and mechanical" test which Congress rejected in enacting the 1974 amendments. *See,* p. 7, *supra.* The Court eschews the *in camera* inspection permitted by the Act as well as the case by case approach so strongly supported by the legislative history. *Title Guarantee, supra,* at 490. As the Fifth Circuit noted below, if this had been the sole purpose of the 1974 amendments to exemption 7, Congress could very easily have amended the statute to require disclosure of only closed investigatory files.[18] (A-112, footnote 8.) Instead, Congress

[18] *See,* Note, The Impact of the FOIA on NLRB Discovery Procedures, 10 Michigan Journal of Law Reform, 493 (Spring, 1977). Cited with approval, *Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra.*

wrote exemption 7(A) so that while it was implied that it only applied to open cases, the agency had the burden of showing that disclosure would interfere with that enforcement proceeding.

Affirmance of the Fifth Circuit's Decision Would Not Delay Board Proceedings.

The Board asserts that reviewing requests for disclosure on a case by case basis would unduly delay Board enforcement proceedings. (Br. 41.) This fear is unjustified. If the decision of the Fifth Circuit is affirmed, the courts will quickly establish standards to be applied in determining whether exemption 7 is applicable. These standards will be "perceptible to the NLRB and counsel for charged parties." Note, Michigan Journal of Law Reform, *supra* at 494. Thus, the parties knowing under what circumstances witness statements will be available, will seldom resort to litigation." *Id.*

Exemption 5 Is Inapplicable to the Requested Witness Statements.

Exemption 5 of the FOIA exempts from disclosure "*inter-agency or intra-agency memorandums or letters* which would not be available to a party other than an agency in litigation with the agency." (Emphasis added.) Thus, in order to come within the exemption, materials must first be inter-agency or intra-agency memoranda or letters. *General Services Administration* v. *Benson,* 415 F.2d 878, 880 (9th Cir. 1969). Clearly, the witness statements requested by Robbins do not fit in this category. *Temple-Eastex, Inc.* v. *NLRB, supra,*

410 F. Supp. 183, 185 (E.D. Tex. 1976);[19] *Title Guarantee, supra* at 492-93 n.15 (dictum); *Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131, 1138 (4th Cir. 1977); *Marathon Le Tourneau Co.* v. *NLRB,* 414 F. Supp. 1074, 1080 (S.D. Miss. 1976).

Exemption 5 exempts "those documents and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co., supra* at 149. In passing exemption 5, Congress had in mind the government's "executive privilege," and the attorney's "work product" rule enunciated in *Hickman* v. *Taylor,* 329 U.S. 495 (1947). *NLRB* v. *Sears, supra* at 150, 154.

The House Report noted that in the absence of the rule

> a full and frank exchange of opinions would be impossible if all internal communications were made public. [Agency witnesses] contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to operate in a fishbowl. H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted* in [1966] *U.S. Code and Cong. & Admin. News,* pp. 2418, 2427.

The witness statements sought here do not fit within either category.

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[19] The Court in *Temple-Eastex* stated:

> Both the prefixes 'inter' and 'intra' imply that the communication involved was transmitted from one government employee to another. Sworn statements by persons interviewed by the NLRB are not of this character. No deliberative processes are evidenced by them. *See Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 90 (1973).

The executive privilege is designed to protect the "decision making processes of government." *Tennessean Newspapers, Inc.* v. *FHA,* 464 F.2d 657, 660 (6th Cir. 1972), cited with approval, *NLRB* v. *Sears, Roebuck & Co., supra* at 150; *see also, EPA* v. *Mink, supra* 410 U.S. 73, 93 (1973). Pursuant to the executive privilege embodied in exemption 5, this Court has held that an agency is entitled to withhold from disclosure "intra-agency advisory opinions," and other information reflecting "deliberative or policy making processes." *EPA* v. *Mink, supra,* at 86-89; quoted in *Deering Milliken* v. *Irving,* 548 F.2d 1131, 1137 (4th Cir. 1977). However, this Court has also held that this privilege does not encompass compiled factual material or purely factual material contained in otherwise exempt deliberative memoranda where the factual material can be severed from the memoranda. *NLRB* v. *Sears* at 87-88; *Deering Milliken* v. *Irving, supra* at 1137-1138; *Soucie* v. *David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The witness statements sought here are clearly not the type of memoranda or letters referred to in exemption 5. *Title Guarantee* v. *NLRB, supra.* 407 F. Supp. 498, 502 (S.D. N.Y.), *rev'd on other grounds,* approved *in dictum,* 534 F.2d 484, n.15 (2nd Cir. 1976). Rather, it is purely factual material which would not be subject to the executive privilege. *Id.*

The Board contends that the factual-deliberative distinction does not apply to the attorney's work product privilege (Br. 49), and that the witness statements are exempt under that privilege. The Board's argument is without merit. In the first place, it ignores the requirement that the materials be inter- or intra-agency memoranda or letters. Secondly, and more impor-

tantly, the legislative history and the case law are unwavering in their requirement that materials exempt from disclosure under exemption 5 be deliberative and not merely factual. *Title Guarantee* v. *NLRB, supra* at 502-503; *Deering Milliken* v. *Irving, supra* at 1138; cf. *EPA* v. *Mink, supra* at 89; *Soucie* v. *David, supra.* Inasmuch as the witness statements sought by Robbins do not come within either the executive privilege or the attorney-work product privilege, the exemption is not applicable.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae* pursuant to the written consent of all parties.[1] The EEAC supports the position of the respondent, Robbins Tire & Rubber Company, in urging the Court to affirm the decision of the Fifth Circuit Court of Appeals.

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[1] Their consents have been filed with the Court Clerk.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (61 Stat. 136, 73 Stat. 519, 88 Stat. 395). As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the Fifth Circuit properly ruled that the Freedom of Information Act (FOIA) (5 U.S.C. § 552, *et seq.*) does not permit the National Labor Relations Board to adopt a *per se* rule of refusing to disclose to Board respondents the written statements of those persons who the Board has indicated would be called to testify in Board hearings. In particular, insofar as the NLRB involves itself in issues involving equal employment,[2] the availability

[2] *See, e.g., Emporium Capwell Co.* v. *Waco*, 420 U.S. 50 (1975); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938); and *Westinghouse Electric Corporation*, pending NLRB Case No. 6-CA-7680 (Whether the Administrative Law Judge properly recommended that the employer be required to turn over to union copies of its EEO-1 form, affirmative action plans and other equal employment data). In the latter case, EEAC submitted a brief *amicus curiae* and participated in oral argument before the full Board. *See also* Axelrod & Kaufman, *Mansion House-Bekins-Handy Andy: The NLRB's Role in Racial Discrimination*, 45 Geo. Wash. L. Rev. 675 (1977).

of witness affidavits in Board proceedings will have great importance to the interests of EEAC's membership.[3]

Moreover, as a group of employers concerned with procedures under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and other equal employment statutes and regulations, EEAC has a strong interest in the impact which the Court's decision in this case can be expected to have on Title VII litigation involving the Equal Employment Opportunity Commission (EEOC) and the United States Department of Justice. Recently, the Fourth Circuit held that the FOIA did not permit the EEOC to apply a *per se* rule of refusing to provide its litigation adversaries with copies of the affidavits of charging parties. *See Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F. 2d ——, 16 FEP Cases 680 (4th

[3] Because of its interest in issues pertaining to equal employment, the EEAC has sought and been granted permission by this Court to file briefs as *Amicus Curiae* in a number of recent cases which raised both substantive and procedural Title VII issues. *See, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 14 FEP Cases 1505 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977); *Christiansburg Garment Co.* v. *EEOC*, 98 S.Ct. 694 (1978) and *Gardner* v. *Westinghouse* (No. 77-560).

Cir. 1978).[4] The court and the parties in that case based their arguments primarily on relevant decisions arising under the National Labor Relations Act. Indeed, the Fourth Circuit adopted the reasoning of the Fifth Circuit in the instant case. *See* 16 FEP Cases at 683, 685 n. 5. *Cf. EEOC* v. *Los Alamos Constructors*, 382 F. Supp. 1373 (D.N. Mex. 1974).

STATEMENT OF THE CASE

Briefly, in the consolidated unfair labor practice and representation proceeding before the NLRB, the employer submitted to the Board a FOIA request asking that within seven days of the hearing it be provided the statements in the Board's possession of witnesses the Board intended to call to testify. The Board refused to comply with the request, relying on Exemptions 5, 7(A), (C) and (D) of the FOIA. The district court, however, ordered that the statements be turned over to the employer. On appeal, the Fifth Circuit affirmed the district court's decision. Both courts specifically rejected the Board's position that it should *never* have to turn over such documents prior to trial because disclosure *might* subject witnesses to intimidation or harassment. The Fifth Circuit held that the Board's *per se* approach was inconsistent with the legislative history of the FOIA, and that the Board had not sustained its burden of

[4] New charge processing procedures adopted by the EEOC while the *Charlotte-Mecklenburg* case was pending, which provide in part for predetermination discussions of evidence between the agency, the respondent and the charging party, and which may be inconsistent with both the EEOC's position in that case and the Board's position here, are discussed *infra* at pp. 22-24.

proving that disclosure would produce witness interference in this particular case.

SUMMARY OF ARGUMENT

I.

Congress amended the FOIA in 1974 to rectify its construction by various courts which had approved mechanical or *per se* rules of nondisclosability under Exemption 7 where documents were part of an "investigatory file." The amendments to Exemption 7 provide six specific factors which can justify nondisclosure of all or part of a document where, but only where, an agency proves a statutorily recognized harm from disclosure "in the context of the particular enforcement proceeding."[5] The Congressional design anticipates *in camera* examination of documents at issue by the district court as a normal part of determining whether the agency has borne its burden of proof on an exemption claim, or as to whether any portion of a document was "segregable."

In this case the Board cites Exemption 7(A), claiming that disclosure of witness statements would interfere with its enforcement proceeding. The Board has submitted no proof in support of its claim of *per se* exemption for witness statements in its investigatory files. Rather it theorizes that disclosure would dry up or subject to retaliation its information sources and give earlier access to investigatory file material to respondents.

The lower courts herein correctly rejected the Board's *per se* claim, finding it incompatible with the

[5] 120 Cong. Rec. S17,033 (1974) (Remarks of Sen. Hart).

language and legislative intent expressed in the 1974 FOIA amendments. The Board's interpretation of Exemption 7(A) would nullify the *in camera* and "segregable records" provisions of the FOIA and resurrect the mechanical approach to the exemption that Congress proscribed. Moreover, the Board's theory of interference is speculative and is notably at odds with the face-to-face factfinding procedure of the Equal Employment Opportunity Commission which brings charging parties and their employers together precisely for the purpose of discussing the issues and facts underlying a discrimination charge.

The Board's blanket claim to Exemption 7(A) for all witness statements is demonstrably invalid on other grounds. Many types of witness statements, including those of former employees, charging parties, exculpatory statements, union officials' statements, supervisors giving evidence in cases of union unfair labor practices, statements of non-employee, non-union, and non-employer related individuals, by nature simply do not give rise to the purported harms of disclosure on which the Board seeks to justify its policy. Accordingly, the decision below rejecting the Board's position was correct, since in enacting the 1974 amendments "Congress intended to proscribe the use of a mechanical test such as that enunciated in *Title Guarantee* in favor of a case by case factual inquiry in determining whether to require disclosure of investigatory records." *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F.2d ——, ——, 16 FEP Cases 680, 685 (4th Cir. 1978).

II.

The Board also misconstrues Exemption 5 of the FOIA when it argues that these witness statements constitute "intra-agency memorandums" or its attorneys' "work product." As this Court noted in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 89 (1973):

> [v]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand and purely factual, investigative matters on the other.

Accord, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Under these cases, Federal agencies may not retain, in the face of a FOIA request, factual or investigative materials which are severable from the agency's deliberations. Relying on these Supreme Court decisions, the decided cases hold that witness statements fall into the "factual" category and therefore are not memoranda under Exemption 5. *See, e.g., Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131 (4th Cir. 1977).

Furthermore, the Board's assertion that these statements are the "work product" of its lawyers [6] ignores the decision in *Goldberg* v. *United States*, 425 U.S. 94 (1976), which held that a testimonial statement prepared by a government attorney and signed by the witness was *not* to be construed as a work product protected from disclosure.

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[6] The Board cites *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

ARGUMENT

I. THE BOARD'S ASSERTION OF *PER SE* NONDISCLOSABILITY OF WITNESS STATEMENTS CANNOT BE SUSTAINED UNDER EXEMPTION 7(A) OF THE AMENDED FOIA

This Court has stated emphatically that Congress passed the FOIA "to establish a general philosophy of full agency disclosure" and structured it so as to make "virtually every document generated by an agency . . . available to the public . . . unless it falls within one of the Act's nine exemptions." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). The legislative history of the FOIA justifies this broad construction of the statute. Because agency exemption claims sustained by the courts had seriously eroded the philosophy of the original 1967 FOIA, Congress amended the FOIA in 1974.[7] The amended Act makes clear that the burden of proving that any document is exempt is on the agency. 5 U.S.C. § 552(a)(4)(B). Moreover, it vests the courts with responsibility to test claims of exemption on a case-by-case basis. To carry out this duty, the 1974 amendments specifically authorize the courts to examine requested documents *in camera* to determine whether all or any part of the documents qualifies for an exemption.

The position of the Board herein, and of the courts following *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976),

[7] *See* 45 Geo. Wash. L. Rev. 114, 117-20 (1976); *Fuselier* & Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 U. Rich. L. Rev. 541, 542-43 (1976).

again ignores the Congressional intent and establishes categories of *per se* nondisclosable documents without the required agency showing that interference with an enforcement proceeding would result from disclosure. This approach eviscerates the *in camera* examination and "segregable records" provisions of the amended Act and erroneously returns to the improper mechanical approach that prompted Congress to amend the Act in 1974. *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F.2d ——, 16 FEP Cases 680 (4th Cir. 1978).

A. The Language and Purpose of Exemption 7(A) Require Case-By-Case Evaluation of Agency Assertions That Disclosure Would Interfere With An Enforcement Proceeding

Exemption 7 of the FOIA as originally enacted, covered "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 80 Stat. 251. The courts eventually construed that provision to permit nondisclosure upon the simple assertion by an agency that a document was contained in an investigatory file compiled for law enforcement purposes.[8] Dissatisfaction with this "wooden and mechanical" rule of nondisclosability caused Congress to amend the Act.[9]

[8] *See, e.g., Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 523 F.2d 370 (D.C. Cir. 1974); *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974); *Aspin* v. *Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisberg* v. *Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

[9] As amended Exemption 7 (5 U.S.C. § 552(b)(7)) covers:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production

120 Cong. Rec. S17,034 (1974) (Remarks of Sens. Hart and Kennedy). *See Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra,* —— F.2d at —— 16 FEP Cases at 685. Senator Hart, the author of the amendment, stated that its purpose was to eliminate the "stone wall" created by this *per se* approach and to require the courts to decide each case on the unique facts presented. 120 Cong. Rec. S17,033 (1974). Specifically addressing the latter point, Senator Hart stated (*id.*):

> In determining whether or not the information to be released will interfere with a law enforcement proceeding *it is only relevant to make such determination in the context of the particular enforcement proceeding.* (emphasis added).

Echoing this view of the statute, the "Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act" (Feb. 1975) (hereafter Attorney General's Memorandum) states that Senator Hart's amendment would "require consideration of the *particular document* and the need to withhold it." *Id.* at 5. (Emphasis added). *Accord,*

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of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal nvestigation, or by an agency conducting a lawful national security intelligence investigation confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Charlotte-Mecklenburg Hospital, supra, —— F.2d at ——, 16 FEP Cases at 685.

The legislative intent embodied in the six clauses of Exemption 7 [10] was to limit application of the exemption to instances in which the agency proves disclosure of a particular investigatory record would cause one of the specific delineated harms.[11] The amendment requires that the government "specify some harm in order to claim the exemption" and does not "afford . . . all law enforcement matters a blanket exemption." 120 Cong. Rec. H 36626 (1974) (Remarks of Cong. Reid). To prevail here, the Board must demonstrate that harm to its enforcement proceeding "will occur." *McDonnell Douglas Corp.* v. *NLRB,* 92 LRRM 2072, 2073 (C.D. Cal. 1976), *app. pending,* No. 76-1580 and cases there cited. *Accord, Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131, 1135 (4th Cir. 1977).

When the government seeks to utilize one of the specific provisions of Exemption 7 to prevent disclosure, the party requesting the information has the right to challenge the nondisclosure in district court. 5 U.S.C. § 552(a)(4)(B).[12] In such an action, Con-

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[10] *See* note 9 *supra.*

[11] *See NLRB* v. *Hardeman Garment Co.,* 406 F. Supp. 510, 91 LRRM 2853, 2854 (W.D. Tenn. 1976) (The court "must be furnished the documents in question before making this determination under all of the circumstances.").

[12] Section (a)(4)(B) of the Act provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has

gress explicitly placed on the agency the burden of proving by a preponderance of the evidence, the applicability of the claimed exemption. *Id.*

To facilitate the case-by-case adjudication of claims of exemption noted by Senator Hart, the 1974 amendments authorize the district courts to examine *in camera* all requested documents. *See* note 12 *supra.*[13] Indeed, *in camera* examination was expected to be the normal procedure in reviewing agency nondisclosure. Thus, the Attorney General's Memorandum states that (pp. 5-6): "Because of the change from 'files' to 'records' and the provision concerning reasonably segregable portions of records [14] . . . the particular documents must ordinarily be examined." [15] The Attorney General went on to state that exceptions to the individual *in camera* examination procedure were "obviously likely to be rare, at least with respect to presently existing files." *Id.* at 6 n. 6. Board files containing witness statements were, of course, "presently existing files."

Despite the amendments to the FOIA, the Board seeks a blanket exemption for all witness statements in its "open" investigatory files.[16] In this case the Board neither submitted the statements to the district court for *in camera* examination nor provided any evidence whatsoever of the purported harm to its enforcement proceeding from disclosure of the requested statements. (Pet. app. 120). In fact, the Board represented to the district court that *in camera* examination was unnecessary as there was absolutely

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jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

[13] Various courts had interpreted the 1967 Act not to include provision for *in camera* examination. *See, e.g., Aspin* v. *Dept. of Defense,* 491 F.2d 24, 27 (D.C. Cir. 1973); *Weisberg* v. *Dept. of Justice,* 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974). *See also Frankel* v. *SEC,* 460 F.2d 813 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972).

[14] *See* section (a)(4)(B) in note 12 *supra.* "The legislative history of [the provisions for *in camera* inspection and disclosure of reasonably segregable portions of documents containing some exempt material] indicates that Congress intended to codify a deletion principle, already applied in numerous instances by courts and agencies, so as to prevent the withholding of entire records or files merely because portions of them are exempt, and to require the release of nonexempt portions. (H. Rep. No. 92-1419 on Administration of the Freedom of Information Act, pp. 55, 72 (92d Cong. 2d Sess. 1972); H. Rept. p. 7; S. Rept. pp. 17, 31, 32; 120 Cong. Rec. 9313 (May 30, 1974) (Senator Kennedy); and *see, e.g., Bristol Myers Co.* v. *FTC,* 424 F.2d 935, 939 (D.C. Cir. 1970); *Gruman Aircraft Engineering Corp.* v. *Renegotiation Board,* 425 F.2d 578 (D.C. Cir. 1970)." Attorney General's Memorandum at 14.

[15] *See Kaminer* v. *NLRB,* 90 LRRM 2269, 2272 (S.D. Miss. 1975).

[16] Moreover, the Board, contrary to the decisions of the Tenth and Second Circuits, *Poss* v. *NLRB,* 565 F.2d 654 (10th Cir. 1977), *Title Guarantee Co.* v. *NLRB,* 534 F.2d 484 (2d Cir. 1976), *cert. denied,* 429 U.S. 834, apparently still claims a *per se* exemption even for entire "closed" case files. *See,* Board brief at 33 n. 17.

nothing unique about the statements at issue here. (Pet. app. 62).

The Board's alleged proof of harm to its enforcement proceeding consists solely of generalized assertions that disclosure of witness statements could (1) provide charged parties with premature disclosure of the government's investigation and permit the party to construct defenses and (2) inhibit employees from volunteering information for fear of reprisal. Although *Title Guarantee* and its progeny accepted these arguments, they do not withstand scrutiny under the amended FOIA.

The Board and the precedents upon which it relies ignore the thrust of the 1974 amendments, "to require consideration of the particular document and the need to withhold it." Attorney General's Memorandum at 5. Illustrative of this approach, *Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63, 65 (10th Cir. 1976), a decision principally relied on by the Board,[17] holds that Congress could not have intended the courts "to determine on a case by case basis whether a particular file would interfere with NLRB enforcement proceedings." That court also stated that because of the potential for employer retaliation or coercion "there is no need for an express showing of interference in each case" to invoke Exemption 7(A). *Id. Accord*, *Title Guarantee*, *supra*, 534 F.2d at 491-92. Each of these contentions is at war with both the statutory language and the legislative history. For, as shown above, "it is only relevant to make [an interference] determination in the context of the particular enforcement proceeding." 120 Cong. Rec. S17,033 (1974) (Remarks of Sen. Hart).[18]

[17] *See, e.g.*, Board Br. 34, 40.

The Board's protracted argument that Congress did not intend to give earlier access to investigatory files or to disrupt the cases construing the 1967 FOIA which held witness statements *per se* privileged is wide of the mark. For, as shown, the entire object of the 1974 amendments was to eliminate the court decisions which had adopted *per se* rules of nondisclosability. Instead, Congress inserted the requirement of case by case analysis with the courts conducting *in camera* examinations to determine whether an agency had concretely proved that interference would occur upon disclosure. The legislative history does not support the Board's contention that Congress sought only to overrule certain non-labor District of Columbia Circuit decisions. (Br. 26-27). Thus, Senator Kennedy noted that Congress was disapproving of the District of Columbia decisions but that the Congress also wanted to eliminate the precedential value of any cases restricting access on the basis of *per se* rules. Senator Kennedy stated (120 Cong. Rec. S 17035 (1975):

[18] *See* Comment, *The Impact of the FOIA on NLRB Discovery Procedures*, 10 U. Mich. J. L. Ref. 476, 493 (1977).

There is no reason to expect a continuing abundance of FOIA suits if the Board's mechanical nondisclosure rule is rejected in favor of the case by case approach mandated by Congress. Standards will quickly develop and the decision in this case will substantially answer questions on disclosability of statements, just as the decision in *NLRB* v. *Sears*, *supra*, substantially resolved questions of the availability of bona fide Board memoranda.

> Judicial and agency adherence to the requirements of these amendments should go a long way to removing strict and undiscriminating adherence to narrow interpretations of the Freedom of Information Act. This would apply to the area of investigatory files as well as to the other exemptions of the Act. So I think that *courts would have to reconsider their reliance on any restrictive cases after passage of these new provisions anyway.* (emphasis added).

The *Wellman Industries Inc.* v. *NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974), line of cases relied upon by the Board were clearly examples of the restrictive *per se* line of cases to which Senator Kennedy's remarks had reference. Such decisions cannot maintain their vitality when considered in light of the full purposes and history of the 1974 amendments.

The Fourth Circuit recently recognized that *Wellman* was clearly among the cases applying Exemption 7 in an overbroad fashion, *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, *supra*, —— F.2d at ——, 16 FEP Cases at 685, and that "[t]o correct this application of exemption 7 by the courts, the Congress in 1974 amended exemption 7" to limit its application to situations where the agency could prove a specific interference with an enforcement proceeding. *Id.* And exactly contrary to the Board, the Fourth Circuit has noted that courts must determine each claim "with an adequate factual basis," utilizing the *in camera* inspection. *Id.* Thus the Board's chief case in support of its *per se* approach is no longer viable precedent.

The Board's interpretation of Senator Hart's statements that earlier access to investigative files was unintended ignores Senator Hart's express declaration that interference was to be determined on the basis of proof in each particular case. Senator Kennedy's expression shows that the Congressional intent in amending the FOIA was not limited to overruling several District of Columbia Circuit decisions. In any event, this Court has previously stated that when "faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 366, *quoting Vaughn* v. *Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975).

B. The Board's Claim of Potential Interference With Enforcement Proceedings Does Not Justify Its Blanket Policy of Nondisclosure of Witness Statements

Even if generalized claims of interference with enforcement proceedings could suffice to invoke Exemption 7(A) of the amended FOIA, the Board's speculative assertions of possible interference with such proceedings are inadequate to justify its broad policy of nondisclosure of witness statements. The crux the Board's argument is the thesis that employees will be subject to retaliation and coercion and will be inhibited from giving evidence to the Board. But without specific evidence of a particular respondent's proclivity to such actions, as required by the court of appeals here, (563 F.2d at 722, 96 LRRM at 3134-35), that thesis cannot be sustained.

1. *There is no support for the Board's premise that pretrial disclosure of witness statements will increase the danger that witnesses will be coerced or intimidated*

The Board asserts that employees will be reluctant to give evidence if they know that their statements can be disclosed to their employer. However, even under the Board's approach there is no real assurance of confidentiality. Frequently the Board obtains statements without giving such assurances. *Maremont Corp.* v. *NLRB*, 91 LRRM 2804, 2809 (W.D. Okla. 1976), rev'd on other grounds, 93 LRRM 2799 (10th Cir. 1976). In *Maremont*, it was noted that the Board "admits that the witnesses . . . were never given assurances of confidentiality" by the Board agent. 91 LRRM at 2809. The court concluded that "[w]ith no such assurances of confidentiality, it is hard to see where these witnesses would have been reluctant to come forward if their identities and affidavits were to become known to the company under F.O.I.A." *Id.* at 2809-2810. Similarly, in *McDonnell Douglas Corp.* v. *NLRB*, *supra*, 92 LRRM at 2075, the court stated that the Board had "not contended that the witness statements requested here were given to the [NLRB] with a promise of confidentiality." Moreover, after considering the following four factors: "(a) the nature and contents of the witness statements; (b) the nature of the underlying unfair labor practice proceedings, (c) the Board's own Rule and Regulations and (d) the representation of counsel for the [NLRB] that each of the witnesses involved would be called and each of the witness statements involved would in any event be turned over to plaintiff at the hearing in Board Case No. 21-CA-

13835," the court concluded that "no promise of confidentiality or anonymity could reasonably be inferred." *Id.* See *Title Guarantee Co.* v. *NLRB*, *supra*, 534 F.2d at 489 n. 11 and cases there cited.

Indeed, since any important witness will be called to testify at the hearing, the only real question as to disclosure of the statement relates to the time of disclosure—prehearing as ordered by the courts below or post testimony pursuant to the Board's Jencks Act Rule, 29 C.F.R. 102.118(b). In such a situation, the Board delays but does not eliminate the possibility of retaliation against an employee witness. As the Fifth Circuit aptly analyzed the situation:

> [T]he Board's own house rule, 29 C.F.R. § 102.118 (1968), contemplates the delivery after the witness has testified, of all his pre-trial statements held by the Board. This regulation, we think, further negates the contention that discovery would improperly expose informers, since it requires that statements of witnesses be turned over anyway. We are unable to see how the danger of coercion or reprisal becomes greater if we require that the statements to the Board of witnesses who testify be turned over at the discovery stage rather than during the course of the hearing.

NLRB v. *Schill Steel Products, Inc.*, 408 F.2d 803, 805 (5th Cir. 1969). *Accord*, *McDonnell Douglas*, *supra*, 92 LRRM at 2075.

While the Board speculates that pretrial disclosure of witness statements may lead to coercion and intimidation, the opposite may actually be true in many cases. Release of an employee's statement before trial may enhance the protection against retaliation. Re-

lease puts the employer on definitive notice that the employee has cooperated with the Board, and thus calls into play the express statutory protection against harassment or retaliation against witnesses found in Section 8(a)(4) of the NLRA. *See NLRB* v. *Scrivener*, 405 U.S. 117 (1972). "If retaliation ensues, the Board will have no trouble establishing the employer's knowledge. Where the Board's burden has been so greatly simplified, the employer may be inhibited from retaliatory action." [19] This situation would be similar to the familiar union practice of sending an employer a letter or telegram identifying the employees on the union's in-plant committee during an organizational campaign. Unions employ this tactic so that if an employee organizer is discharged or otherwise disciplined, the employer's knowledge of the employee's union activities will be clearly established.

In any event, there is no empirical evidence to support the Board's hypothesis that earlier disclosure of witness statements would cause employees to cease supplying statements to the Board. After a successful FOIA suit against the Board,[20] an empirical study of the influences on employees in representation elections was conducted. The results of that study show that many of the Board's operating assumptions as to how employer or union conduct affects employee choice in elections are absolutely erroneous. *See* Getman & Goldberg, *Union Representation Elections: Law and Reality*, 1976. Similarly here, there is no

[19] *The Impact of the FOIA on NLRB Discovery Procedures*, 10 U. Mich. J. of L. Ref. 476, 482 n. 47 (1977).

[20] *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971), stay denied, 404 U.S. 1204.

empirical evidence to support the Board's supposition that witness statement disclosure would inhibit employee frankness with the Board.[21]

The insubstantial nature of the Board's claims of *per se* interference from disclosure is also indicated by the fact that substantially all of the district courts examining statements *in camera* have found the Board's Exemption 7(A) claim unwarranted. While several of these decisions were reversed when courts of appeals accepted the Board's *per se* nondisclosure claim, it remains significant that experienced district court trial judges, vested with initial responsibility for determning whether specific harm to enforcement proceedings would occur, found no prospect of such harm.

Cessna Aircraft Co. v. *NLRB*,[22] is illustrative. There the court found: "After review of the two statements of witnesses, *in camera*, the Court . . . finds as a fact that disclosure of the two statements in question will not interfere with enforcement proceedings." 405 F.Supp. at 1052, 90 LRRM at 3340. Judge Gagliardi made similar findings in *Title Guarantee Co.* v. *NLRB*.[23] "The Court has reviewed the material in question and concludes that release . . . would not block further information of the same type from similar sources nor would it stifle effective preparation of the case. In addition, it does not ap-

[21] *See* 51 St. John's L. Rev. 251, 268 n. 92 (1977).

[22] 405 F.Supp. 1042, 1052, 90 LRRM 3339, 3340 (D. Kan. 1975), rev'd on other grounds, 542 F.2d 834 (10th Cir. 1976).

[23] 407 F.Supp. 498, 504-05, 90 LRRM 2849, 2853 (S.D.N.Y. 1975), rev'd on other grounds, 534 F.2d 484 (2d Cir. 1976).

pear that the specific enforcement proceeding would be harmed." 407 F.Supp. at 50, 504-05, 90 LRRM at 2853.[24]

2. *The EEOC's use of face-to-face factfinding procedures refutes the Board's theory that pretrial secrecy is essential to its enforcement proceedings*

Although the Board speculates that pretrial disclosure of witness statements would impede its enforcement of the NLRA, procedures recently implemented by the Equal Employment Opportunity Commission and decisions under Title VII (42 U.S.C. 2000e *et seq.*) indicate that a statute protecting employees against unfair practices by employers and unions can be enforced without such secrecy.

The EEOC has recently provided by regulation (29 CFR § 1601.15(c))[25] for face-to-face factfinding to expedite processing and settlement of Title VII charges of employment discrimination "in most instances."

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[24] *Accord, McDonnell Douglas Corp.* v. *NLRB, supra,* 92 LRRM at 2074, 2075; *Deering Milliken, Inc.* v. *Nash,* 90 LRRM 3138 (D.C. S.C. 1975) aff'd in relevant part, 548 F.2d 1131 (4th Cir. 1977); *Maremont Corp.* v. *NLRB,* 91 LRRM 2804, 2808-2809 (W.D. Okla. 1976) rev'd on other grounds, —— F.2d ——, 93 LRRM 2799 (10th Cir. 1976).

[25] Section 1601.15(c) provides:

> The Commission may require a fact finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain where there is a basis for negotiated settlement of the charge.

BNA, *EEOC Compliance Manual,* § 14.7, p. 14:0003. During this process the alleged discriminatee and the employer or union are brought together "to accelerate the investigation of a charge" and sharpen areas of agreement and disagreement. *Id.* at § 14.2, p. 14:0001. This is facilitated by having the charging party and the respondent fully state their positions and facts concerning each alleged unlawful act in detail. The EEOC Compliance Manual describes this process as follows (*id.* at § 14.5(c), p. 14:0003):

> Each allegation of the charge will be closely examined and fully discussed; the charging party will be allowed ample time to explain and support each allegation, the respondent to present and defend its position.

This process is a graphic refutation of the Board theories on premature disclosure of its case and discouraging employee willingness to come forward with the facts. The EEOC process requires the disclosure of all pertinent facts and theories in the face-to-face factfinding process. Should the EEOC later sue, the respondent will be apprised of the major facts and issues from the Commission's chief witnesses. But neither this fact, nor identification of the employees supporting Title VII charges is deemed a hazard to the EEOC's enforcement proceeding. In fact, the EEOC finds that the process spurs negotiated settlement of charges.[26] And if a charging party fails

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[26] The former Regional Director of the Board's Philadelphia Regional Office felt that with disclosure of information from NLRB investigative files "respondents may approach settlements more realistically . . . [and] more settlements may be obtained . . ." Samoff and Falkin, *The Freedom of Information Act and the NLRB,* 15 B.C. Ind. & Com. L. Rev. 1267, 1285 (1974).

to timely participate in the factfinding conference, "the charge will be dismissed." BNA, *EEOC Compliance Manual*, § 14.7, p. 14:0004. In short, while the federal agency charged with preventing racial, sexual, religious and national origin discrimination *requires* participation in a process that apprises respondents of the substance of a future enforcement proceeding and identifies the employees involved, the NLRB should not be heard to speculate, without any supporting evidence, that pre-hearing disclosure of witness statements (which would contain similar information) would interfere with its enforcement proceeding.

3. *The Board's theory of potential interference has no relevance to many types of witness statements to which its absolute nondisclosure policy is applied*

Even if there were support for the Board's premise that fear of retaliation through the employment relationship would, as a general rule, deter employees from providing statements which could be disclosed to their employers prior to a hearing, that premise is not nearly broad enough to sustain the Board's nondisclosure policy. For the danger envisioned by the Board simply has no relevance to many kinds of witness statements to which the agency's nondisclosure policy is applied. For example, the Board refuses to disclose statements of former employees, charging parties, exculpatory employee statements, supervisor's statements in union unfair labor practice cases, statements of union officials and those of individuals without connection to the employer or the union, even though none of these situations presents

the kind of danger of intimidation and coercion which the Board offers as the main justification for its claim of exemption.

Consideration of the statements of former employees is illustrative. The question of the disclosability of EEOC investigatory file statements of former employees was presented in *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F.2d ——, 16 FEP Cases 680 (4th Cir. 1978). The Fourth Circuit affirmed the ruling of the district court that such statements were disclosable. The EEOC, like the Board here, had contended "for a strict *per se* rule of nondisclosure." *Id.* at 686. The Fourth Circuit noted that there was "no warrant" for such a rule and that "the 1974 Amendments clearly proscribed" (*id.*) court acquiescence in "the use of a mechanical test." *Id.* at 685. Moreover, the harms of disclosure asserted by the Board are plainly absent in the case of former employees. A former employee has no fear of on the job retaliation, no matter how subtle the opportunities for job harassment that the Board may conjure. For the same reason, there is no inhibition on future witness cooperation with the Board. As the Fourth Circuit observed, the EEOC could not argue "that the district court's finding, after such [*in camera*] review, that disclosure would not have a chilling effect on present employees or would not interfere with the investigation [was] erroneous." *Id.* at 685-686.[27]

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[27] As the Board did not submit the statements at issue here for *in camera* examination, it is possible that former employee statements may be involved.

The same is true of statements of charging parties. The Board is required under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), to serve a copy of any charge of an unfair labor practice "upon the person against whom such charge is made."[28] This Congressional requirement, therefore, makes the identity of a charge-filer known to the employer. In such circumstances, it is impossible for the Board to show that disclosure of such a charge-filer's statement could either inhibit such an individual's cooperation or subject him to a greater threat of retaliation.[29]

Nor can the Board justify nondisclosure of statements tending to exculpate a respondent in a Board proceeding. First, as to the Board's fear of retaliation or drying up of information sources, there is no problem whatsoever. For an employer has no motive to retaliate against an employee giving evidence to the Board that the employer did not commit any unfair labor practices charged. *Temple-Eastex, Inc.* v. *NLRB*, 410 F. Supp. 183, 92 LRRM 2915 (E.D. Tex. 1976). Nor will the employee be inhibited from cooperating with the Board in such a situation.[30]

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[28] A similar requirement is imposed under Title VII. See § 706(b) which requires notice of the "date, place and circumstances of the alleged unlawful employment practice" to the respondent.

[29] As is the EEOC practice, *see supra*, pp. 23-24, the NLRB will dismiss the charge of an uncooperative charging party. See NLRB Case Handling Manual, Part I, Section 10056.1 (hereafter "NLRB Manual").

[30] The district court can determine the exculpatory nature of the statement in its *in camera* examination. *Temple-Eastex*

Secondly, as to the Board's contention that release of statements will hurt the government's case, the Board is on even weaker ground. For in *Berger* v. *United States*, 295 U.S. 78, 88 (1935), this Court noted that the obligation of the government in a law enforcement "prosecution is not that it shall win a case, but that justice shall be done." *Accord, EEOC* v. *Los Alamos Construction, Inc.*, 382 F.Supp. 1373, 1383, 8 FEP Cases 963, 971-972 (D.N.M. 1974). Certainly the Board cannot claim that any harm to its case from disclosure of exculpatory statements is a harm Congress intended Exemption 7(A) to cover. Conformity with the previous decisions of this Court and with the intent of Exemption 7(A) plainly indicate that the Board's *per se* nondisclosure rule is *per se* incorrect with respect to exculpatory statements.[31]

Next, consider statements by union officials. The Second Circuit opined that if statements of union officials were disclosed they "might not want to volunteer information for fear of compromising the union's position in negotiations." *Title Guarantee, supra*, 534 F.2d at 491. While this theory might have sufficed under the original FOIA, it is plainly insufficient to support exemption under § 7(A).

The district court in *Title Guarantee* followed the correct procedure and examined *in camera* the union

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v. *NLRB, supra. See, Impact of FOIA on NLRB Discovery*, 10 U. Mich. J. L. Ref. 476, 493 (1977).

[31] Even if the Board, in a future case, could demonstrate that there would be harm from disclosure of other parts of a statement containing exculpatory matters, it would be required to disclose the latter under the "segregable record" provisions of §§ (a) (4) (B) and (b) of the FOIA.

official's statement therein and concluded (407 F. Supp. at 505):

> [R]elease of the information would not block further information of the same type from similar sources nor would it stifle effective preparation of the case.

While the Board can argue that disclosure of a particular union offiical's statement would compromise a union negotiating position, the Board bears the burden of proving this interference in a particular case, and the district courts, like the *Title Guarantee* district court, should test this by *in camera* examination. *McDonnell Douglas Corp.* v. *NLRB*, *supra*, 92 LRRM at 2073-2074. Certainly, not every statement given by a union official will concern the union's negotiating stance. This is precisely why the kind of "mechanical test . . . enunciated in *Title Guarantee*" was proscribed by Congress in 1974 "in favor of 'a case-by-case' factual inquiry in determining whether to require the disclosure of investigatory records." *Charlotte-Mecklenburg Hospital*, *supra*, —— F.2d at ——, 16 FEP Cases at 685.

Also exempt from disclosure under the Board's interpretation of FOIA § 7(A) are statements of supervisors in cases involving charges of union unfair labor practices. Yet the Board's conjecture about potential retaliation against witnesses in the subtleties of the employer-employee relationship is totally inapplicable where the supervisor gives evidence against a union. Nor will there be any general reluctance on the part of supervisors to give future statements in cases against unions.

A final example of the error of the Board's *per se* approach is found in statements of individuals who

are not employees, union officials or supervisors. Individuals who have no direct relationship to the union or the employer may give statements in the Board's investigation of an unfair labor practice charge. Such persons are not in the employer-employee relationship and not subject to retaliation, yet the Board applies its nondisclosure policy to their statements as well.

In sum, it is plain that disclosure of many kinds of statements taken in the course of the Board's investigations does not involve even the theoretical harms to enforcement proceedings that the Board posits as its proof of interference to support its Exemption 7(A) claim. The Board's treatment of these kinds of statements makes clear why Congress chose to reject a mechanical approach and put the agency to its proof in the particular case to sustain a claim of exemption. That the Board has utterly failed to do here.

II. FOIA EXEMPTION 5 DOES NOT PERMIT THE BOARD TO WITHHOLD PURELY FACTUAL STATEMENTS SWORN TO BY PERSONS WHO HAVE BEEN DESIGNATED TO BE CALLED AS BOARD WITNESSES

The Board also claims that the witness statements are either "intra-agency memorandums" or its attorney's "work product", and therefore exempt from disclosure under Exemption 5 of the FOIA.[32] The

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[32] That exemption provides (5 U.S.C. § 552):

> (b) This section does not apply to matters that are—
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> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . .

Board's construction of this exemption has found little court support,[33] and is markedly at odds with this Court's recent explicit holdings.

A. The Statements Are Not Intra-agency Memorandums Containing Deliberative Matter but Rather Contain Mere Factual Data Unprotected by Exemption 5

The cited cases (in footnote 33) which reject the Board's Exemption 5 arguments properly interpret this Court's holdings in *Environmental Protection*

In construing whether Exemption 5 applies, a two-step analysis should be undertaken. First, a determination is made of whether the document is an inter- or intra-agency memorandum. Only after the requested material passes this first test ought the Court decide if the Board's work product theory has any merit. *See The Impact of the FOIA on NLRB Discovery Procedures,* 1977 U. Mich. J. of L. Ref. 476, 485-486.

[33] For several of the cases rejecting both the Board "memorandum" and "work product" theories, *see e.g.: Title Guarantee Co.* v. *NLRB,* 407 F.Supp. 498, 502-03 (S.D.N.Y. 1975), discussed with approval in dictum in *Title Guarantee* v. *NLRB, supra,* 534 F.2d at 492 n. 15; *Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131, 1137-38 (5th Cir. 1977); *Poss* v. *NLRB,* 565 F.2d 654, 659 (10th Cir. 1977); *McDonnell Douglas Corp.* v. *NLRB,* 92 LRRM 2072, 2076 (C.D. Cal. 1976), appeal pending No. 76-1580 (9th Cir.), and cases cited therein; *Electri-Flex* v. *NLRB,* 412 F.Supp. 698, 703 (N.D. Ill. 1976); and *Maremont Corp.* v. *NLRB,* 91 LRRM 2804, 2807-2808 (W.D. Okla. 1976), rev'd on other grounds —— F.2d —— (10th Cir. 1976). *Cf., Charlotte-Mecklenburg Hospital Authority* v. *Perry,* —— F.2d ——, ——, 16 FEP Cases 680, 682 n. 5 (4th Cir. 1978); and *Kent Corp.* v. *NLRB,* 530 F.2d 612, 624 (5th Cir. 1976), cert. denied, 429 U.S. 920 (Disclosure of NLRB Final Investigation Reports denied, with the recognition that "[t]he contents of the reports are not primary information, such as verbatim witness testimony or objective data . . .").

Agency v. Mink, 410 U.S. 73 (1973), and *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1974). These Supreme Court decisions make it clear that parties litigating with federal agencies are entitled to receive factual and investigative matters from the agency. Only if the requested document *itself* contains elements of the agency's deliberative discussions or policy-making processes does Exemption 5 even arguably apply. But even in such circumstances, factual material must be exercised, when possible, and revealed to the agency's litigating opponent. 5 U.S.C. 552(a)(4)(B), (b). *See Mink, supra,* 410 U.S. at 89. Accordingly, the statements in question here are clearly beyond the scope of Exemption 5, for the Board does not appear to argue that any traces of its case-handling deliberations are contained within the statements themselves. Rather, the Board merely urges that the statements are useful in evaluating the available evidnce (Br. at 45-46).

An analysis of the nature of the documents makes clear why the Board's presentation is so limited. As the district court observed, and as discussed above, the Board has never claimed that there is anything unusual about the witness statements involved here. (Pet. App. 62). They consist of nothing "other than an average statement obtained during a routine investigation." *Ibid.* Indeed, the statements are not even in memorandum or letter form (*ibid.*).[34]

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[34] *See Temple-Eastex, Inc.* v. *NLRB,* 410 F. Supp. 183, 185 (E.D. Tex. 1976) ("Both the prefixes 'inter' and 'intra' imply that the communication involved was transmitted from one government employee to another. Sworn statements by persons interviewed by the NLRB are not of this character.")

As the Board's brief and Case Handling Manual point out, witness affidavits are utilized as a *factual* tool in an investigation. They provide objective evidence by which the Regional office determines whether or not to issue a complaint, and thereafter permit the General Counsel on appeal to make a reasoned judgment over whether a case was properly dismissed. (See NLRB Br. at 45-48; and NLRB Case Handling Manual, Part I, Sections 10058.1 through 10058.5).[35] In short, as the Second Circuit stated:[36]

> the documents sought here are not 'memorandums' . . . they do not summarize or evaluate facts or contain recommendations for agency action based upon facts . . . the statements as a whole lack the deliberative quality associated with intra-agency memoranda and attorney's work product. See *NLRB* v. *Sears, Roebuck & Co.*, . . ., 421 U.S. at 159-160.

Accord, Soucie v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1976), and cases cited.

Exemption 5 is also inapplicable because witness statements are generated by private citizens, not by agency personnel. *See Wu* v. *National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971).

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[35] As this Court is well aware, the NLRB utilizes other internal memoranda to undertake its deliberative and policy-making functions. These documents include advice and appeals memoranda (*N.L.R.B.* v. *Sears, supra*, 421 U.S. 132), and final investigation reports (*Kent Corp.* v. *N.L.R.B., supra*, n. 33).

[36] *Title Guarantee Co.* v. *N.L.R.B., supra*, 534 F.2d at 492, n. 15.

Unless a document originates within an agency it is not an inter or intra-agency memorandum. *See* H. Rept. No. 1497, 89th Cong., 2d Sess. 10 (1966) ("[A] full and frank exchange of opinions would be impossible if all *internal communications* were made public." (emphasis added)); *The Impact of the FOIA on NLRB Discovery Procedures*, 10 U. Mich. J. L. Ref. 476, 485-486 (1977). Accordingly, the witness statements here involved fail to qualify as memoranda included within the definition of Exemption 5.[37]

B. The Work Product Doctrine Does Not Apply to Signed Witness Statements Obtained in the Board's Investigation

As an apparent fall-back argument, the Board argues that the "work product" privilege[38] permits it to retain purely factual material which is otherwise disclosable under this Court's decision in *EPA* v. *Mink* (Br. at 46-47). But as the Fifth Circuit observed in *Deering Milliken, Inc.* v. *NLRB*, *supra*, 548 F.2d at 1138, 94 LRRM at 2362-2363:

> The General Counsel argues that the work-product privilege is not limited by the factual-

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[37] In *Charlotte Mecklenburg Hospital* v. *Perry, supra*, 16 FEP Cases at 682 n. 5, the Court noted that the EEOC apparently abandoned any claim that Exemption 5 protected purely factual or investigatory reports. Also of significance is the fact that the "Guidelines For Processing of Requests Under the Freedom of Information Act" of the NLRB General Counsel do *not* recommend invoking Exemption 5 in denying requests for witness statements. *See* pp. 22-23, a9 a13, and a15 or the reprint of the Guidelines in BNA, *White Collar Report*, No. 957, Aug. 8, 1975, C-6, C-7, C-11, C-14 and C-16.

[38] The Board relies primarily on *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

deliberative distinction set forth in *Mink*; instead, this privilege embraces all factual material assembled for trial by a litigant's attorney or other representative.

We cannot accept the General Counsel's interpretation of exemption 5. To allow such a broad exemption under the work-product rule would frequently swallow the distinction between factual and deliberative matters so carefully delineated by the Court in *Mink*. The General Counsel's argument would lead to the anomalous result of withholding factual material despite the Supreme Court's recognition that the same material would not be withheld under executive privilege because it 'would generally be available for discovery by private parties in litigation with the government.' *Mink*, 410 U.S. at 88. Therefore, we view the factual-deliberative distinction emphasized in *Mink* relevant to a consideration of the work-product privilege (Footnote omitted).

In support of its "work product" theory, the Board cites extensively to the decision in *Hickman* v. *Taylor* (Br. at 46-47, n. 26), but fails to mention several of the Court's premises which cut against the Board's position. In *Hickman*, the Court repeatedly stressed that production of the requested material was not shown to have been necessary. 329 U.S. at 508-509. Thus, the requesting attorney already had exercised his broad discovery rights under the Federal Rules of Civil Procedure and had received extensive responses to detailed interrogatories. The opportunity to take depositions also was noted, as well as the fact that the petitioner was free to examine public testimony of the witnesses on the same facts which had been given before the United States Steamboat Inspectors. (*Ibid*).

The Court then pointedly said that it was *not* holding that all written materials obtained or "prepared" by an adversary's counsel with an eye toward litigation were necessarily free from discovery in all cases. 329 U.S. at 511-512. It stated (*ibid*):

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.

The Court then held that Rule 30(b), Fed. R. Civ. Pro., gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. The Fifth Circuit's holding here thus is consistent with *Hickman* v. *Taylor*. The court below merely rejected the Board's arguments favoring *per se* application of the FOIA exemptions, and rather, would permit the district court to examine the permissibility of disclosure on a case-by-case basis. See 563 F.2d at 730-733.[39]

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[39] The Board indicates (Br. at 47) that the Court in *Hickman* v. *Taylor* also noted that special care should be taken in

In contrast to the broad discovery available to the requesting party in *Hickman* v. *Taylor*, discovery in NLRB proceedings is almost negligible.[40] Indeed, the Board acknowledges that even when settlement is a real possibility, the Regional Offices "openly discuss" the General Counsel's evidence but still refuse to reveal even to respondents the names of witness. (Br. at 19-20). That fact alone eliminates the pertinence of *Hickman* v. *Taylor* to the Board's work product assertions.[41] *See Labor Law—Pre Hearing Discovery of Employees' Statements*, 1970 N.C.L.R. 368, 376-377. More to the point is the observation of Mr.

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ordering the disclosure of "oral statements" of witnesses, because of problems it foresaw in requiring an attorney to repeat personally what he was told by a witness. The oral statements which concerned the Court involved attorney Fortenbaugh's recollection of information that persons had told him which had never been reduced by him to written memoranda. 329 U.S. at 498-499, 512-513. No such statements are involved here. The Board's Case Handling Manual, Part I, Section 10058.5 requires that witness statements be reduced to writing and then sworn to by the witness. See also the NLRB's Rules and Regulations, 29 C.F.R. § 102.118(d).

[40] *See* Note, 1976 Geo. Wash. L. Rev. 114, 116-117; *The Impact of the FOIA on NLRB Discovery Procedures, supra*, 1977 U. Mich. J. of L. Ref. at 477-479; Connolly and Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 1977 Fordham L. Rev. 203, 230-234.

[41] Rule 26(b)(3) of the Federal Rules of Civil Procedure likewise does not assist the Board's position (Br. at 48 n. 28, and 50 n. 30). The rule omits any reference to "witness statements" when it states that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Justice Jackson in his concurring opinion in *Hickman* v. *Taylor* that (329 U.S. at 519):

> There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available.

Such circumstances certainly exist here. *Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra*, —— F.2d at ——, 16 FEP Cases at 684-685.

Such limited discovery as is available to Board litigants is provided for in Section 112.118(b)(1) and (2) of the Board's Rules and Regulations.[42] The regulations prohibit any discovery prior to the hearing, and allow disclosure of witness statements only after the witness has testified at the hearing. This section of the Board's rules is essentially identical to the Jencks Act, 18 U.S.C. § 3500 (1957). (Board Br. at 15, n. 2). This Court's most recent pronouncement on the Jencks Act as it relates to the work product privilege is completely at odds with the Board's position. See *Goldberg* v. *United States*, 425 U.S. 94 (1976).[43]

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[42] 29 C.F.R. § 112.118(b)(1) and (2).

[43] The Board relies upon two other Jencks Act decisions which are not apposite. In *United States* v. *Nobles*, 422 U.S. 225, 238-239 (1975), the Court discussed the work product doctrine in dictum, but stated that it would not undertake to delineate the scope of the doctrine because, in the case at bar, the defense had waived such right as may have existed to invoke its protections. 422 U.S. at 239. The Court's subsequent delineation of the doctrine is found in *Goldberg* v. *United*

In *Goldberg*, this Court held that a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that had been signed by the witness was producible under the Jencks Act and was not rendered nonproducible because the lawyer interviewed the witness and wrote the statement. 425 U.S. at 98. The Court saw nothing in the Jencks Act that would prevent the production of the statements on the ground that they consituted the attorney's "work product". 425 U.S. at 101-102.[44] In discussing *Hickman* v. *Taylor*, and *United States* v. *Nobles* (*supra*, n. 43), the Court stated that its decision would not undermine the work

States, discussed below but uncited by the Board. Also, *Palermo* v. *United States*, 360 U.S. 343 (1959), simply involved a determination of whether the memorandum involved was a "statement" under the Jencks Act definition. No such issue arises here.

[44] Indeed, the government virtually conceded at one point that no broad work product exemption existed. *See* 425 U.S. 102, n. 5, which excerpts the following statement from the government's brief:

> "We believe that there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the tesimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator. For if what is involved is truly the statement of the *witness*—that is, a statement written and signed or otherwise formally adopted or approved by him or a substantially verbatim recording of an oral statement—by definition it does not contain the mental impressions, trial strategy or personal beliefs of an attorney. Such material thus implicates only tangentially, if at all, the policies underpinning the work product doctrine." Brief for United States 27-28.

product doctrine. The lawyer's mental impressions, personal beliefs, trial strategy and legal conclusions would still protected, and could be exercised from the witness' own statements when necessary under the relevancy defense contained in the Jencks Act. 425 U.S. at 106.[45] As this Court recently stated, decisions explaining the attorney's work product rule are "applicable to Government attorneys in litigation." *See NLRB* v. *Sears & Roebuck Co.*, *supra*, 421 U.S. at 154.

In summary, the witness statements involved here contain purely factual matter which reveal nothing about the Board's deliberative processes. The Board's argument that it need not disclose these statements because they are useful in its case evaluation is monumentally inconsistent with the legislative history of Exemption 5 and the decision in *EPA* v. *Mink*. Moreover, a statement signed by the witness is not covered by any work product privilege. *Goldberg* v. *United States*.

[45] Significantly, the Board's own regulations contain no specific mention of any work product privilege. The only defense to post-testimonial production of witness statements is that the statement contains matter "which does not relate to the subject matter of the testimony of the witness." 29 C.F.R. § 102.118(b) (2).

CONCLUSION

For the foregoing reasons and under the circumstances of this case, the decision of the Fifth Circuit below should be affirmed, and the Board ordered to turn over to the employer statements of persons which the Board has indicated it will call to testify at the hearing.

Respectfully submitted,

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